IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JESSE SOLOMON,

Plaintiff

vs.

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN and THE NFL PLAYER SUPPLEMENTAL DISABILITY PLAN,

Defendants.

Case No. 1:14-cv-3570-MJG

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: July 31, 2015

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Plaintiff Jesse Solomon submits this memorandum in support of his motion for summary judgment as to disability pension benefits under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). Defendants are The Bert Bell/Pete Rozelle NFL Player Retirement Plan and The NFL Player Supplemental Disability Plan (collectively, the "NFL Plan" or the "Plan").[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Professional football as played in the NFL is the most violent game in America (if not the world), often leading to career-ending and life-altering injuries for players. Knee, back, ankle, shoulder, and hand injuries that have combined to cripple or impose chronic pain on many NFL retirees have long been known. Brain injuries are just as common. The NFL's own internal estimates, recently uncovered as part of the League's efforts to settle ongoing class-action brain-injury litigation, are that nearly a third of retired players will develop long-term cognitive problems and that these symptoms are likely to emerge at notably younger ages than in the general population. *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323 (AB), MDL No. 2323 (E.D. Pa.) (the "*Concussion Litigation*").

NFL players, through their union, have collectively bargained with NFL team owners for disability benefits administered by the Plan. Players who become totally and permanently disabled ("TPD") by orthopedic or brain injuries that are the regular result of pro football, and are therefore unable to work, are entitled to well-defined disability

[1] Most of the citations here are to the version of the Administrative Record produced by the Plan, which will be filed by Defendants, and is cited as "AR-____." Several additional documents that were in Defendants' possession, or known to them, are attached as exhibits and are cited as "Pl. Exh.____" *See Helton v. AT&T, Inc.*, 709 F.3d 343 (4th Cir. 2013) discussed at *infra* p. 19.

benefits. The highest levels of benefits are set aside for former players who become TPD at the time of or shortly after their NFL injury, or—as in this case—within 15 years of retirement ("Football Degenerative" benefits).

Jesse Solomon sustained almost 70,000 "full-speed contact hits" and dozens of injuries during his nine years of pro football, playing the linebacker position from 1986 until the 1994-95 season. [8/3/09 Solomon letter (AR-513); 2008 Matuszak report at 5 (AR-437)]. Mr. Solomon described often hitting players so hard that he would have "triple vision" after an impact, and numerous hits where "everything would go silent and then the volume would increase." [DiDio 2/17/11 Report (AR-616)]. He recalled "too many times to count" that he was "dazed or experience[ed] amnesia for the events of the game." *Id.*

An orthopedist hired by the NFL Plan to examine Mr. Solomon found that he had permanent injuries to the "neck, shoulder, elbow, hands, knees, ankle, feet, *etc*.," all caused by pro football. [Canizares 4/17/09 Report at 1 (AR-484)]. A neurologist also retained by the Plan found that Mr. Solomon suffered from "severe cognitive impairment, depression, anxiety, and near-daily migraine headaches" caused by "innumerable" on-the-field collisions and "many Grade 1 and Grade 2 cerebral concussions" resulting in "severe post-concussion/post-traumatic syndrome." [DiDio 2/17/11 Report (AR-619)]. This same Plan-selected neurologist concurred with a psychiatrist's assessment that Mr. Solomon "probably is demonstrating features of

Chronic Traumatic Encephalopathy," or CTE – the hallmark of the NFL's bitter legacy of brain injuries for its retired players.[2] *Id.*

Although Mr. Solomon worked for a decade after leaving the NFL in 1995, his injuries preventing him from working after 2007, well within the 15-year (March 2010) window for more generous Football Degenerative TPD benefits. A Social Security Administration ("SSA") Administrative Law Judge found him completely disabled as of October 29, 2008 [6/21/11 SSA Notice of Decision (AR-680)], and the Plan's language expressly requires that a player found disabled by the SSA is "deemed [by the Plan] to be totally and permanently disabled." [AR-25]. Similarly, Mr. Solomon's psychiatrist observed the disabling effect of Mr. Solomon's multiple concussions in June 2010 – not even three months after the March 2010 cutoff. [6/11/2010 J. Fernandez Report (AR-763)]. The Plan's neurologist agreed, noting in 2011 that Mr. Solomon had "presented with progressive worsening in cognition ***over 5-10 years*** with decreased attention, poor concentration, slurred speech, decreased recall and increased irritability." [DiDio 2/17/11 Report at 1 (AR-615), emphasis added]. Mr. Solomon's treating physicians concurred that his numerous concussions and orthopedic injuries disabled him by 2008 – again, well within the 15-year window for TPD benefits.

But despite these clear-cut medical and legal findings, the NFL Plan concluded that Mr. Solomon lacked evidence of his disability before March 31, 2010. The Plan did so by (a) relying on evidence that the Plan had *already rejected* in deciding Mr.

[2] CTE is a unique neurodegenerative disease caused by pro football's repetitive blows to the head. In its milder forms, CTE is characterized by a mood disorder with disabling depression and bouts of rage. In more severe forms, CTE can cause severe and disabling confusion and memory loss. Baugh, *et al.*, "Current Understanding of Chronic Traumatic Encephalopathy," 16 *Current Treat. Options Neurol.* 306 (2014).

Solomon's disability claim, and (b) ignoring detailed neuropsychiatric and neuropsychological evaluations of Mr. Solomon on June 11 and August 23, 2010 that found him completely disabled. [Fernandez 6/11/10 Report at pp. 1, 4 and 16 (AR-763, 766, 778); Fernandez 8/23/10 Note at p. 1 (AR-781)]. Based on this spurious reasoning, the Plan denied Mr. Solomon the higher level of Football Degenerative disability benefits he had earned.

Defendants have abused their discretion in administering the NFL Plan by denying Mr. Solomon the full TPD benefits to which he is entitled. This Court should correct that injustice and order the Plan to grant Plaintiff those benefits.

STATEMENT OF FACTS

A. Governance of the Plan

Eligibility and disability benefit decisions for the Plan are made in the first instance by a two-person Disability Initial Claims Committee (the "DICC"). DICC decisions, in turn, are subject to review by or appeal to the Retirement Board (the "Board"), which consists of six voting members who meet quarterly. Half the members of the DICC and half the voting members of the Board are appointed by the NFL (*i.e.*, team owners) and the other half are appointed by the NFL Players Association (the "NFLPA") (*i.e.*, the players' union). (Answer, ¶ 11).

The terms of the NFL Plan are set forth in documents that are amended and restated from time to time by the Board (collectively, the "Plan Document"). Under § 8.7(b) of the Plan Document, any action by the DICC concerning a decision on disability benefits requires a unanimous decision by both members of that committee.

Under § 8.7(a), any action by the Board concerning a decision on disability benefits requires an affirmative vote by four of the six voting members.

At all relevant times, neither the Board nor the DICC included any members with applicable health care or disability experience.

B. Relevant Disability Benefits

Section 5.2(a) of the Plan Document states that a former player "will be deemed to be [TPD] if the [Board] or the [DICC] finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." [AR-25]. Alternatively, the Plan provides for another method of determining TPD status:

> [A] Player who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled . . .

§ 5.2(b) (exceptions not relevant omitted).[3] [AR-25].

There are four types of TPD benefits available under the Retirement Plan, only three of which are relevant here. (Answer, ¶ 3) In descending order of benefit amounts, the three types are:

- "Active Football" benefits, awarded under § 5.1(a) of the Plan Document where the disability results from NFL football activities, the player is an "Active Player" as that term is defined in the Plan Document, and the player becomes TPD "shortly after" the disability first arises;

- "Football Degenerative" benefits, covered by § 5.1(c) of the Plan Document, where the disability arises out of NFL football activities but the

[3] *See also* § 5.8(b)(1) (addressing players who applied for a specific type of benefit during a four-month "window period" in 2008 and will "be deemed totally and permanently disabled for all months" for which they receive Social Security disability payments). [AR-29].

player does not become TPD "shortly after" the disability first arises (but in no event later than 15 years from retirement); and

- "Inactive" benefits, awarded pursuant to § 5.1(d) of the Plan Document where the total and permanent disability arises out of other than NFL football activities.[4]

Because the type of benefits depends on whether the disability is the result of playing NFL football, the Board and/or the DICC must first make a determination of that issue. When the NFL Plan determines that the disability is the result of NFL football activities, the date when the disability arose must also be determined. As explained above, under § 5.1(c) of the Plan Document, a player who becomes TPD within 15 years of the end of his last NFL football season is entitled to the second-highest level of benefits, Football Degenerative.

Lately, the NFL Plan has taken steps to eliminate a definitive medical determination of the onset date of a disability by changing the Plan's form provided to physicians selected by the Plan for independent medical examinations. Previously, the "Physician's Report" which the examining doctor was asked to complete asked the specific question, "When did present disability occur," so that the onset date of the disability – and thus the type of benefits – could be determined based on expert medical evidence. Pl. Exh. 1.[5] However, in recent years the Plan has changed its "Physician's Report" form to delete this question. [*See*, *e.g.*, Mr. Solomon's TPD Physican Report Forms (AR-484, 613)]. This change permits the Board and the DICC to claim

[4] The fourth type of TPD benefits are "Line-of-Duty Disability Benefits" to ex-players who suffer a "substantial disablement . . . arising out of League football activities." Plan § 6.

[5] *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. WDQ-04-1606 (D. Md.) (cited hereafter as "*Jani v. Bert Bell Plan* (D. Md.))," D.E. #35-2, Exh. 22, filed 12/20/04.

uncertainty about the onset date of claimants' total and permanent disability; to substitute their unqualified medical judgment for that of examining physicians; and thus to deny claimants benefits to which they were entitled.

C. Jesse Solomon

1. His Personal Background and Playing Career

Jesse Solomon was born in 1963. He graduated from Florida State University with a degree in political science, then played nine seasons of NFL football, principally as a linebacker, from 1986 to 1994 for the Minnesota Vikings, Dallas Cowboys, Tampa Bay Buccaneers, and Miami Dolphins. [Answer, ¶ 21; see also NFL Transaction History (AR-479-80)]. During his nine years and more than 100 games in this extraordinarily violent sport, Mr. Solomon endured nearly 70,000 hits, dozens of injuries, multiple concussions, and five different operations on his right and left knees. [Matuszak 10/29/08 Report at 5 (AR-437)].

Mr. Solomon's football career ended in 1994 after he suffered an injury that ripped his quadriceps tendon off his kneecap. He returned to college, completed a Masters program at Florida A&M University, received a Florida teaching and coaching certificate, and worked as a high school football coach and physical education teacher. [Press 9/18/09 Report at 2 (AR-527); DiDio 2/17/11 Report at 2 (AR-616); 3/11/09 Solomon TPD Application (AR-468-69)]. But his multiple football injuries, concussions, and surgeries began to take their toll and, as both the years and the pain advanced, he became progressively unable to work for a living. In 2007, he was forced to resign his coaching and teaching job. By at least 2008 (13 years after retiring from the NFL), and probably before that date, he was substantially unable to hold down a job because of

the combined effect of his orthopedic and brain injuries. [Fernandez 6/11/10 Report at 4 (AR-766); 4/11/11 Hudson Letter at 1 (AR-667)]. Mr. Solomon has been unemployed and unable to work since 2007. [Solomon 3/11/09 TPD Application (AR-468); 8/3/09 Solomon Letter (AR-513)].

2. Mr. Solomon's 2009 Application for TPD Benefits

Mr. Solomon first applied for TPD benefits on March 11, 2009. [AR-468]. Although this appeal concerns the Plan's denial of Mr. Solomon's 2010 application, it is worth reviewing the proof of Mr. Solomon's total and permanent disability as it was presented to the Board in 2009 to appreciate fully the totality of medical evidence of Mr. Solomon's disability – and why it was an abuse of discretion for the Plan later to refuse to give effect to the SSA's finding that he was totally and permanently disabled.

As early as 2006—a year before Mr. Solomon was forced to retire from his job as a high school teacher and football coach—his physician, Dr. Mark Hudson, noted his broad array of injuries "that are likely to worsen with time and are seemingly the result of the violent conditions he experienced during his career." [Hudson 2/15/06 Report at 3 (AR-365)]. Dr. Hudson also reported the results of a 2005 MRI of Mr. Solomon's brain, which found widespread changes "that are most likely a result of multiple high velocity impacts in a helmet-to-helmet fashion and chronic concussion syndrome." [*Id.* at 2 (AR-364)]. Dr. Hudson repeated those findings two years later, observing in 2008 that "Mr. Solomon's claims for disability are well founded based on his long service to the NFL

and they are not likely under any circumstances to resolve with any currently known therapy."[6] [6/10/08 Hudson Report at 2 (AR-374)].

On October 29, 2008, Occupational Therapist Brian Matuszak completed a detailed, half-day assessment [AR-433] of Mr. Solomon's purely orthopedic injuries, known as a Functional Capacity Evaluation, or FCE. Mr. Matuszak calculated that Mr. Solomon had endured approximately 69,000 "full-speed contact hits" in nine years of pre-season camp, pre-season games and regular-season games. [*Id.* at AR-437]. He concluded that "[b]ased on the objective findings of the FCE, . . . [it is] questionable whether Mr. Solomon is able to safely return to [even sedentary] work . . . as he has poor endurance, concentration, balance and tolerance to sitting, standing and walking for greater than 30 minutes combined at one time without taking rest periods and alternating positions." [*Id.* at 435].[7]

Dr. Edward Matsu, an orthopedist, reviewed the Matuszak FCE and concluded on January 28, 2009 that Mr. Solomon was "not able to perform even sedentary type[s] of work. This makes Mr. Solomon completely disabled from any type of employment." [Matsu 1/28/09 Report at 1 (AR-465)]. Dr. Matsu confirmed these findings in a March

[6] Dr. Hudson also prepared a note dated April 11, 2011 which concluded that "for the recent past," Mr. Solomon had been "disabled from seeking, gaining or maintaining any meaningful employment." Dr. Solomon linked this disability explicitly to the "measurable injuries to [Mr. Solomon's] skeletal system" as well as his "severe cognitive impairments" and "changes in his normal behavioral pattern," all "due to multiple concussions." [Hudson Report (AR-667)].

[7] Mr. Matuszak also assessed that Mr. Solomon was unable to concentrate fully on some tests of function, or expend full effort on those tests, because of "increased neck, upper and lower back pain, shoulders, elbows, hands, knees and ankle pain." [Matuszak Report (AR-437)]. Despite this fact, a subsequent report commissioned by the Plan found that Mr. Solomon was not disabled precisely because he was unable to comply with the examiner's instructions. [1/6/11 Report of Glen Perry (AR-586)].

31, 2010 note which relied on an updated FCE, concluding that "It is clear that Mr. Solomon is disabled and is not able to perform any physical activities [or] sedentary . . . work because of his injuries and the objective data supporting his condition as per testing analysis." [3/31/10 Matsu Report at 1 (AR-548)].[8]

Only one examination of Mr. Solomon related to his 2009 application for benefits concluded that he was not totally and permanently disabled due to his orthopedic injuries – and that was by the Plan's hand-picked doctor. Dr. George Canizares, an orthopedic surgeon selected by the Plan to examine Mr. Solomon, found impairments to Mr. Solomon's "neck, shoulders, elbows, hands, knees, ankles, feet, etc." [4/17/09 Form at 1 (AR-484)]. He also found that each impairment was the result of an NFL injury that was likely to persist at least 12 months. (*Id.*) "Based on the current injuries," he concluded, "it would be hard for this gentleman to engage in anything that would involve prolonged standing or walking." [Canizares Report (narrative), p. 6 (AR-491)]. As a result, the most that Dr. Canizares could say was that "this patient is *probably* qualified to do a very low demand light duty activity." (*Id.*, emphasis added).

Despite this compelling evidence of Mr. Solomon's inability to work, the NFL Plan rejected his 2009 application, both initially by the DICC (May 18, 2009) and on appeal to

[8] One examination was equivocal. On September 18, 2009, Dr. Joel Press examined Mr. Solomon after a second FCE. Dr. Press found that Mr. Solomon's "multiple musculoskeletal problems . . . are consistent with playing professional football" and that as a result "he will probably be very limited in any type of employment that he would pursue." [9/18/09 Press Report at p. 6 (AR-531)]. Like Occupational Therapist Matuszak, Dr. Press found that Mr. Solomon had "chronic pain syndrome," which impaired his ability to execute even on examination, let alone at work. [AR-531]. Even for sedentary work, Dr. Press concluded, Mr. Solomon would "need to have the opportunity to change positions throughout the day as his condition warrants." [*Id.*]

the Retirement Board (November 25, 2009). [5/18/09 Letter (AR-497) and 11/25/09 Letter (AR-541)].

3. Mr. Solomon's 2010 Application for TPD Benefits

Mr. Solomon next applied for TPD benefits on December 12, 2010 [Disability App. at p. 5, (AR-566)], and it is the Plan's denial of this application that is the subject of this action. His application identified "multiple traumatic brain injuries," "nerves impairment," and "depression and anxiety" as disabilities. The medical evidence supporting his claim of mental disability was overwhelming and, in fact, undisputed. In addition to this medical evidence, the Board also had before it the SSA's finding of total and permanent disability (retroactive to October 2008), which should have resulted in granting Mr. Solomon's application for Football Degenerative benefits. This medical evidence, and the SSA determination, are discussed below.

a. Dr. Fernandez's June 2010 Report

On June 11, 2010, Mr. Solomon was examined by Dr. Jamie Fernandez, a psychiatrist affiliated with the University of South Florida. Dr. Fernandez conducted what the NFL Plan's neurologist later described as an "extensive" neuropsychiatric evaluation and neuropsychological testing, comprised of almost a dozen separate protocols. [(6/11/10 Fernandez Report (AR-763); DiDio 2/17/11 Report at 1 (AR-614)]. This was the first time that a mental health professional (a psychiatrist, psychologist or neurologist) had examined Mr. Solomon to determine the effect of his multiple concussions on his ability to work.[9]

[9] As noted above, his treating physician had observed changes in an MRI of Mr. Solomon's brain as early as 2005 that he concluded were almost certainly the result of

Dr. Fernandez observed that Mr. Solomon had "depressive symptoms and [a] passive death wish," and noted his complaints of "behavioral disinhibition, resulting in him leaving his job as a football coach." [Fernandez 6/11/10 Report at p. 1 (AR-763)]. He was "[f]ormerly a high school football coach but because [his] thoughts/behavior were escalating[,] he left." [*Id.* at (AR-766)]. She observed "the role of [traumatic brain injury]-related memory loss and disinhibition," and concluded that Mr. Solomon was "suffering from depressive . . . and behavioral symptoms, [as well as] cognitive dysfunction as the result of" traumatic brain injury and obstructive sleep apnea. [6/11/10 Fernandez Report pp. 4, 16 (AR-766, 778)].[10]

b. Dr. Stallworth's 2010 MRI Report

Mr. Solomon also had an MRI of his brain performed by Dr. Dexter Stallworth on June 11, 2010. According to Dr. Stallworth, this brain scan confirmed the existence of "multifocal . . . lesions along the right and left frontal and parietal lobes of the brain." [Stallworth Report p. 2 (AR-780)]. Dr. Stallworth concluded that "[t]hese areas are consistent with microdisruption of white matter tracts within the brain ***and are thought to be post-traumatic" in nature***. [*Id.*, emphasis added]. This finding confirmed the results of Mr. Solomon's 2005 brain MRI, which had noted similar injuries caused by football. [12/15/05 MRI (AR-346)].

"multiple high velocity impacts" and "chronic concussion syndrome." [2/15/06 Hudson Report at 1 (AR-361)].

[10] Sleep apnea is a recognized consequence of multiple concussions. *See* "Traumatic Brain Injury and Sleep Disorders," *Neurol. Clin.*, Nov. 2012, 30(4): 1299-1312 (accessed on July 11, 2015 at ncbi.nim.nih.gov/articles/PMC3482689/pdf/nihms400055.pdf).

c. Dr. Fernandez's August 2010 Report

Two months later, on August 23, 2010, Dr. Fernandez again evaluated Mr. Solomon. Dr. Fernandez observed Mr. Solomon's "history of TBI in the context of pro football" and noted Mr. Solomon's "decreased attention, poor concentration, slurred speech, decreased recall and increased irritability," along with depression and anxiety, all of which had worsened in recent years. [Fernandez 8/23/10 Report at p. 1 (AR-781]. She concluded that Mr. Solomon "is currently disabled from numerous physical injuries and chronic pain *in addition to* the neuropsychiatric sequelae from which he suffers." [*Id.*, emphasis added].

d. Dr. DiDio's 2011 Report

On February 17, 2011, a neurologist appointed by the Plan, Dr. Adam DiDio, examined Mr. Solomon to address complaints of cognitive impairment, anxiety, depression, and severe recurring headaches. [2/17/11 DiDio Physician's Form (AR-613)]. These included "severe problems with" Mr. Solomon's memory, "poor concentration and focus," becoming "easily distracted," being "easily angered" and "prone to outbursts, "severe headaches on a near daily basis," and "dizziness and blurred vision." [*Id.* at AR-615-16]. Dr. DiDio noted that Mr. Solomon had previously "presented with progressive worsening in cognition over a period of 5-10 years" (*i.e.*, within 15 years of retirement)[11], including "decreased attention, poor concentration, slurred speech and increased irritability," along with "severe depression and anxiety." [*Id.* at AR-615]. As a result, Mr. Solomon – despite his substantial education, training

[11] As noted above, the Plan's exact old report form would have allowed Dr. DiDio to state the date Mr. Solomon's disability began. By design, the new form does not.

and experience as a coach and educator – reported losing several jobs for "losing his cool." [*Id.* at AR-616].

Dr. DiDio credited and agreed with each of Dr. Fernandez's earlier evaluations. [DiDio Rept. (AR-615, 619)]. He found that Mr. Solomon suffered from "severe cognitive impairment, depression, anxiety, and near-daily migraine headaches" caused by "innumerable" on-the-field collisions and "many Grade 1 and Grade 2 cerebral concussions" resulting in "severe post-concussion/post-traumatic syndrome." [AR-619]. Dr. DiDio went on to "agree with [Dr. Fernandez's] assessment" that Mr. Solomon "probably is demonstrating features of chronic traumatic encephalopathy (CTE)." [AR-619].[12] Significantly, Dr. DiDio—the Plan's own doctor—found that Mr. Solomon was totally and permanently disabled. [AR 613-14].

e. Dr. Fernandez's 2011 Assessment

Dr. Fernandez prepared one final assessment of Mr. Solomon, dated April 6, 2011. She noted his 2010 brain MRI, which revealed "microscopic damage throughout many areas of the brain," which was the likely result of "external forces," *i.e.*, the nearly 70,000 full-speed collisions that Mr. Solomon encountered during his NFL career. "Prominent manifestations of this type of brain injury include impaired cognitive function, resulting in disorganization, impaired memory, and varying degrees of inattentiveness." [4/6/11 Fernandez Report, (AR-664)]. Dr. Fernandez reviewed the eleven different tests she had performed on Mr. Solomon almost a year before, in 2010:

> After a careful review of the available data, the patient's symptomatology is consistent with severe postconcussive syndrome, and possible chronic traumatic encephalopathy

[12] As explained above, CTE is the progressive, degenerative disease that is the direct result of pro football's multiple, high speed, violent collisions.

> (CTE), a degenerative brain disease caused by head trauma. Symptoms associated with this disease include: memory impairment, emotional instability, erratic behavior, depression, and problems with impulse control, all of which are contributing to Mr. Solomon's current inability to sustain employment and function socially. [*Id.* at AR-664-65].

She concluded: "In my opinion, Mr. Solomon is currently disabled as the result of multiple traumatic brain injuries sustained in the context of playing professional football, extensive orthopedic injuries, cognitive impairment, and severe symptoms of depression and anxiety." [*Id.* at AR-664].

4. <u>The DICC's March 2011 Rejection of TPD Benefits</u>

The Plan ultimately received six reports from three different physicians (including one chosen by the Plan) which agreed that Mr. Solomon was totally and permanently disabled as a result of repeated concussions. On March 9, 2011, however, the DICC ruled that Mr. Solomon was not disabled, and denied his second TPD application. The Plan's letter notifying Mr. Solomon of this denial stated that one member of the DICC had approved his request, relying on Dr. DiDio's report; but that the other member of the two-person DICC had found "insufficient evidence to support a finding of total and permanent disability." [AR-655]. Pursuant to the Plan's procedures discussed above, this 1-1 deadlock resulted in the denial of Mr. Solomon's application. Notably, the Plan's letter describing its decision did not explain how the evidence was weighed or assessed, or why Dr. DiDio's undisputed findings were insufficient.

Mr. Solomon filed an appeal to the full Retirement Board on April 27, 2011. [AR-672].

5. The Social Security Administration's June 2011 TPD Finding

Meanwhile, Mr. Solomon had applied for Social Security disability benefits on July 13, 2009, and again on December 20, 2010. This latter SSA application was made while his 2010 application to the Plan for TPD benefits was pending. [AR-680].

After consideration of the medical evidence and following a June 16, 2011 hearing, an Administrative Law Judge for the SSA made a "fully favorable decision" in Mr. Solomon's favor:

> I find you disabled as of October 29, 2008 because your impairment or combination of impairments is so severe that you cannot perform any work existing in significant numbers in the national economy.

[AR-680]. Put simply, the SSA found that Mr. Solomon became completely disabled no later than October 29, 2008, 13 years after he had retired from the NFL and well within the 15-year period for Football Degenerative TPD benefits under the Plan. *Id*.[13]

Mr. Solomon promptly advised the Retirement Board of the SSA's disability determination. [AR-683 (June 29, 2011 "Received [by] NFL Player Benefits" stamp)]. The Board had not yet decided Mr. Solomon's appeal when it received this notice of SSA action.

6. The Board's August 2011 Rejection of TPD Benefits, and Subsequent Appeals

The record before the Retirement Board was clear-cut. There was no dispute that Mr. Solomon was completely disabled as a result of multiple traumatic brain injuries, or concussions. In addition, all but one of his treating and examining

[13] This October 29, 2008 disability date is the date of Mr. Solomon's half-day Functional Capacity Evaluation by Occupational Therapist Brian Matuszak which concluded that "Mr. Solomon is not able to perform even SEDENTARY level of work." [AR-435].

physicians after 2009 – Dr. Hudson (2011), Dr. Matsu (2010), Dr. Stallworth (2010), Dr. Fernandez (2010(2), 2011), and Dr. DiDio (2011) – had concluded that Mr. Solomon was totally and permanently disabled. These conclusions were echoed in an authoritative and dispositive manner by the Social Security Administration, which found Mr. Solomon to be totally and permanently disabled as of October 2008, entitling him to Football Degenerative TPD benefits under the Plan Document.[14]

Yet, inexplicably, on August 10, 2011, the Board denied Mr. Solomon's request for full TPD disability benefits, and granted Mr. Solomon only limited "Inactive" TPD benefits. [AR-702].[15] The decision was inexplicable because the Board did not disclose why it rejected both the consensus medical reports and the supposedly dispositive SSA determination. Instead, the Board blandly recited that "[a]fter review of the records you submitted, the Retirement Board found that the record did not support a finding of total and permanent disability prior to March 31, 2010 [the end of the 15-year TPD period]." [AR-705].

Mr. Solomon appealed again, to the Retirement Board, on September 27, 2011. He pointed out that the SSA had already determined he was disabled as of October

[14] The sole exception was a January 2011 report by Dr. Glen Perry, an orthopedist chosen by the Plan who did not address Mr. Solomon's brain injuries. [AR 583-86]. Dr. Perry criticized Mr. Solomon for being "unable to cooperate with [the] examination" and "resisting the range of motion and functional testing," ignoring the fact that two previous examinations had found that Mr. Solomon's chronic pain – not lack of effort – prevented him from completing the tests. [*Id.* at (AR-586); *see* Matuszak Report, (AR-437), and Press Report, (AR-531)].

[15] "Inactive" TPD benefits are the third (and lowest) of the three benefit levels relevant to this case. "Football Degenerative" TPD benefits which Mr. Solomon seeks are the second (and middle) level of benefits. The Plan awarded Mr. Solomon $2,500.50 per month in "Inactive" TPD benefits. [AR-702]. "Football Degenerative" benefits are "no less than $4,000" per month [AR-703], and in fact are considerably more.

2008 – long before the 15-year limit on Football Degenerative benefits – and asked the Retirement Board to "Please consider [the] matter carefully!" [AR-707].

However, on November 23, 2011, the Retirement Board denied Mr. Solomon's appeal. [AR-719]. As with its original denial, the Board did not discuss any specific medical records, let alone explain how it reconciled its denial with the clear medical evidence that Mr. Solomon was totally and permanently disabled within 15 years of his NFL retirement. Instead, the Board concluded that because it had denied Mr. Solomon's 2009 application, there was no reason to change its mind in response to the 2010 application. [AR-720 (a finding of TPD prior to March 2010 would be "incompatible" with its earlier decision)].[16] In response to the Social Security determination of disability as of October 2008, the Board asserted without explanation that "such effective date decisions are not binding on the Plan." *Id*.

On November 14, 2014, Mr. Solomon filed this action.

STANDARD OF REVIEW

A. Abuse of Discretion and the *Booth* Factors

An ERISA plan administrator's decision will be reviewed for abuse of discretion. *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 342 (4th Cir. 2000). This means that the court "will enforce the administrator's decisions *only if they are reasonable*." *Id.* at 344 (emphasis added). "[T]he abuse of discretion standard is less deferential to administrators than an arbitrary and capricious standard would be; to be unreasonable

[16] The Board did assert that "the medical records . . . submitted with [the] current appeal were submitted with [the] prior claim and appeal." [AR-720]. This was plainly false: Mr. Solomon provided several different reports from 2010-11 that were *not* before the Board in 2009. *See supra* p. 16.

is not so extreme as to be irrational." *Evans v. Eaton Corp. Long-Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008).

A "reasonable decision" is one that meets several distinct tests: First, it must be "the result of a deliberate, principled reasoning process and . . . supported by substantial evidence." That process must be both "fair" and "searching." Second, it "must reflect careful attention to the language of the plan, as well as the requirements of ERISA itself." *Id.* at 322-23. *See also Williams v. Metropolitan Life Ins. Co.*, 609 F.3d 622, 630 (4th Cir. 2010).[17]

In *Booth*, the Fourth Circuit established a non-exhaustive list of eight factors which bear on whether the plan administrator abused its discretion:

> [W]e conclude that a court may consider, but is not limited to, such factors as: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have. [201 F.3d at 342-43.]

The administrative record compiled by the Plan provides the primary basis for judicial review. However, the Fourth Circuit has recently made clear that this Court may also consider "evidence outside of the administrative record on abuse of discretion review in an ERISA case when such evidence is necessary to adequately assess the

[17] The Fourth Circuit has consistently rejected efforts to narrow the scope of this review both for the NFL Plan specifically, *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 Fed. Appx. 305, 313 n.5 (4th Cir. 2006) (refusing the Plan's unsupported request "for an even higher level of deference than that typically afforded ERISA fiduciaries, because of the knowledge and skill required to assess football injuries in particular."), and under ERISA generally, *Booth*, 201 F.3d at 343.

Booth factors and the evidence was known to the plan administrator when it rendered its benefits determination." *Helton v. AT&T, Inc.*, 709 F.3d 343, 356 (4th Cir. 2013). Evidence about earlier interpretations of the Plan, the adequacy of the record, and possible conflicts of interest are among the *Booth* factors that often require extrinsic evidence. *Id.* at 354. Such evidence may include information obtained by the Plan's agents and employees acting within the scope of their employment, as well as the Plan's own records and documents. *Id.* at 356.

B. The Plan's History of Abuse of Discretion, Bad Faith, and Denial of CTE

The Plan has a long and documented history of abusing its discretion, acting in bad faith, demonstrating contempt for the ERISA claims review process, and continuing to deny the reality of Chronic Traumatic Encephalopathy for NFL retirees. This history is relevant to *Booth* factors ## 4 and 8 (prior interpretations of the Plan, and Defendants' motives and conflicts).[18]

For example, in *Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan* ("*Jani*"),[19] the Court of Appeals affirmed Judge Quarles' finding of an abuse of discretion (and an accompanying finding of "bad faith")[20] in denying benefits to the estate of former Pittsburgh Steeler Mike Webster. 209 Fed. Appx. 305 (4th Cir. 2006) (*per curiam*). Cases where this and other courts found that the Plan abused its discretion abound.

[18] *See* p. 19, *supra* (under *Helton*, court may consider extrinsic evidence known to plan administrator in order to evaluate *Booth* factors). The Plan certainly knew about its own animus towards the ERISA claims process.

[19] Undersigned counsel represented Mr. Webster's estate in this Court and in the Fourth Circuit.

[20] *Jani v. Bert Bell Plan* (D. Md.), 2005 U.S. Dist. LEXIS 4431, at *4 ("Given the overwhelming evidence supporting Webster's claim, the Plan's decision indicates culpable conduct, if not bad faith").

See Wilber Marshall v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 261 Fed. Appx. 522 (4th Cir. Jan. 2008) (*per curiam*) (affirming bankruptcy court's finding of NFL Plan's abuse of discretion in establishing the "onset date" of plaintiff's disability, the same question raised here); *Giles v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2013 WL 6909200, at *26 (D. Md. Dec. 31, 2013) (Hollander, J.) (entering summary judgment against the Plan and noting that the Plan's discretion "is not without limit. The Retirement Board's decision must be reasonable, and it is not entitled to reach a decision inconsistent with the Plan's plain language."); *Stewart v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2012 WL 2374661, at *14-15 (D. Md. June 19, 2012) (Quarles, J.) (entering judgment against the Plan for retired player based on "substantial evidence" standard).

The Plan's contempt for the ERISA claims process is also evident in public statements by both the NFL and the union, which appoint the Retirement Board. In an interview with the *New York Times* immediately after the Fourth Circuit's ruling in favor of Mike Webster's family, the union's executive director dismissed the Court's ruling, asserting that the Plan would deny benefits for Mr. Webster's repeated concussions again, if given the chance.[21] Two years later, the union's leader again rejected retired players' complaints about routine denials of disability applications, stating that "The bottom line is I don't work for them . . . They don't hire me and they can't fire me. They can complain about me all day long. They can have their opinion. But the active players

[21] Http://www.nytimes.com/2006/12/14/sports/football/14webster.html?_r=0 (statement that if the Plan "was presented with a similar situation with another retired player, it would follow the same course of action it took with Webster.").

have the vote. That's who pays my salary."[22] When one retired player suggested that the union had "throw[n retired players] under the bus," the NFLPA's chief responded by threatening "to break his goddam neck."[23]

In addition to this back-of-the-hand approach to ERISA disability claims, the NFL – which appoints the other half of the Retirement Board -- has for years denied the ever-growing body of scientific evidence that CTE and long-term cognitive problems are the unmistakable legacy of the NFL. Recently, the NFL "doubled down" on its CTE denial, asserting late last year in the *Concussion Litigation* MDL that:

- "The science regarding CTE is new."
- "[N]o conclusions relating to the causes of CTE or the diagnostic and clinical profile of CTE can yet be credibly or reliably established."
- "The specific diagnostic profile of CTE and its causes or even association with football are unknown."[24]

ARGUMENT

I. UNDER THE FRAMEWORK ESTABLISHED IN *BOOTH* AND *JANI*, THE PLAN'S DECISION WAS AN OBVIOUS ABUSE OF DISCRETION.

A. The Plan's Decisions Don't Add Up

The issue is whether Mr. Solomon was totally and permanently disabled as of March 2010. Three facts are not in dispute. **First**, every physician to examine Mr.

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[22] Http://www.si.com/nfl/2008/01/31/upshaw0214.

[23] *Id.*

[24] *In Re: NFL Players' Concussion Injury Litigation*, D.E. # 6422, Nov. 12, 2014, Defs.' Memorandum of Law in Support of Final Approval of the Class Action Settlement Agreement and in Response to Objections, at 85, 86, 89 n.37; excerpts attached as Pl. Exh. 2.

Solomon's mental status – six reports in all from 2010 to 2011[25] – found that he was disabled by his multiple concussions and resulting CTE. This includes one report prepared in June 2010, not three months after the critical date. No contrary evidence exists.

Second, Mr. Solomon has not worked since 2007, and the mental and psychological effects of repeated blows to the head were the principal cause of his retirement. Again, no contrary evidence exists.

Third, the Social Security Administration found Mr. Solomon to be totally disabled as of October 29, 2008, well within the March 2010 cutoff. Here, the medical evidence is lopsided, although one or two doctors appointed by the Plan (none of whom addressed Mr. Solomon's brain injuries) have speculated that he might be capable of sedentary work. However, this minimal dispute is irrelevant: the Plan Document *requires* that Social Security's decision be honored. And even if it did not, those outlier physician reports are entitled to negligible weight, even on abuse of discretion review.

These three facts add up to an obvious abuse of discretion. Review of the individual *Booth* factors leads to the same result. But focus on *Booth*'s "non-exhaustive" list of considerations should never obscure the main point: the undisputed facts and the express language of the Plan Document compel a higher award of benefits to Mr. Solomon. Even if the Plan and its overseers did not have a long history of hostility to disability claims based on repeated concussions, the undisputed facts of Mr. Solomon's case demonstrate that the Plan's denial of benefits was neither "reasonable" nor supported by "substantial evidence." *Evans v. Eaton Corp.*, 514 F.3d at 322-23.

[25] Dr. Hudson (2011), Dr. Fernandez (2010(2), 2011), Dr. DiDio (2011), and Dr. Stallworth (2011).

B. Under the Factors Identified in *Booth* and *Jani*, the Plan's Action Abused Its Discretion

Of the eight factors identified in *Booth*, seven apply here (the one exception is #6, compliance with ERISA requirements). As we now show, each of these seven factors points towards an abuse of discretion.

Factor #1: The decision was contrary to the Plan's language.

Interpreting an ERISA plan document requires consideration of "the plan's plain language in its ordinary sense," according "to the literal and natural meaning of [that] . . . language." *Johnson v. American United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013). This means that "ERISA plans, like contracts, are to be construed as a whole," focusing on a given provision's meaning in the context of the entire agreement." *Id.* Thus, the plan administrator's decision-making process will not be sustained unless it "pay[s] careful attention to the language of the plan." *Evans*, 514 F.3d at 322.

These same rules apply to the NFL Plan, and construction of the Plan requires "looking to the terms of the plan as well as to other manifestations of the parties' intent." *Giles v. Bert Bell Plan*, 2013 WL 6909200, at *14. When the Plan Administrator "construe[s] provisions of the plan in a way that conflicts with the plain language of the plan," that is by its nature an abuse of discretion. *Giles v. Bert Bell Plan*, 925 F. Supp.2d 700, 716 (D. Md. 2012) (Hollander, J.).

Giles is a good example of how these principles must be applied. There, Judge Hollander entered summary judgment against the NFL Plan because it had misapplied the Plan's Social Security "deemed disabled" provisions, §§ 5.2 and 5.8(b). She found that the Plan had "disregard[ed] the Social Security Awards standard for total and

permanent disability," and ignored the fact that "the Plan was . . . amended by contractual agreement to include the Social Security . . . standard as an additional method to demonstrate" a retiree's disability. *Giles*, 925 F. Supp.2d at 720. Because the Plan was "contractually bound to accept" the SSA's determination," those actions were inherently an abuse of discretion. *Id.* at 721. The same result should apply here.

Factor #2: <u>The decision was also contrary to the Plan's purpose</u>.

"A primary purpose of the Plan is to provide disability benefits to qualifying NFL players and their beneficiaries." *Stewart v. Bert Bell Plan*, 2012 WL 2374661, at *10. And because the Plan is collectively bargained, the Retirement Board must show "how its interpretation adheres to the intent of the collective bargaining parties." *Giles v. Bert Bell Plan,* 2013 WL 6909200, at *25.

Here, the Plan Document expressly evidences the parties' intent to give dispositive effect to SSA disability determinations. Section 5.2(b)—the provision directly applicable to this case—states that a former player "who has been determined by the [SSA] to be eligible for disability benefits . . . will be deemed to be totally and permanently disabled." [AR-025]. The clear intent of this "deemed disabled" language was to foreclose further inquiry on the subject and to require the Plan to adopt the Social Security Administration's disability determination as its own.

This purpose behind the Plan's Social Security "deemed disabled" provision was made clear when its drafters announced the adoption of § 5.2(b) in June 2007, during a time of intense public and legislative focus on the NFL Plan stemming from the Mike *Webster* case, *Giles v. Bert Bell Plan*. A "White Paper" concerning this change

produced by the NFL players union (the NFLPA) described the Social Security provision this way:

> [B]ecause of this change, . . . players already receiving Social Security benefits will not have to be examined by a Plan doctor.

[Pl. Exh. 3, the "2007 White Paper" at pp. 5-6 included in *Oversight of the NFL Retirement System*, September 18, 2007 S. Hrg. 110-1177, 2012_PDF # 76-327, p. 51].[26]

This is also how NFL and NFLPA officials characterized § 5.2(b) in public statements at the time of its adoption. News reports quoted "officials from both parties" as saying that "any retired player who qualifies for a Social Security disability benefit will *automatically be approved for NFL disability as well*."[27] They described the new provision as "a dramatic departure from the previous process, which often forced retired players to travel hundreds of miles, and at their own expense, to meet with doctors who did not treat them during their career and were unfamiliar with their cases."[28] NFL Commissioner Roger Goodell was quoted as hailing this change for streamlining the process for disability determinations:

> "We're looking at ways in which people who need help can get help faster," Commissioner Roger Goodell told the [Philadelphia] Daily News. "You have to have some standards. You have to have some kind of process to make sure you're being responsible. ... *If somebody is disabled enough [to qualify] for Social Security [disability], they should be disabled under our guidelines. We've agreed to that."*

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[26] This contemporaneous evidence of the provision's intent is relevant under *Helton*, 709 F.3d at 354, 356, because it is an "earlier interpretation of the plan," a statement by the Plan's agents and employees, and a record held by the Plan.

[27] "NFL Adopting Social Security Guidelines for Disability, ESPN.com, June 25, 2007 (emphasis added), available at http://sports.espn.go.com/nfl/news/story?id=2911872.

[28] *Id.*

Id. (emphasis added).

This description of § 5.2(b) as aligning the Plan's determination of TPD status with SSA's determination of TPD status was also repeated during Congressional testimony by two key Plan representatives, shortly after the change was adopted. Dennis Curran, the NFL's Senior Vice-President, testified that "[w]e are trying to look at ways of speeding up the process. We have adopted the Social Security T & P standards . . . " and that "[w]e are constantly looking to improve the manner in which we do [disability determinations], . . . by speeding up the process, as we tried to do with the Social Security benefits." [Pl. Exh. 4, *National Football League's System for Compensating Retired Players: An Uneven Playing Field?*, 6/26/07 Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, 1st Sess. 110th Cong., at pp. 10, 107]. Douglas Ell, Counsel to the Plan (Mr. Ell's firm continues to represent the Defendants here), was even more explicit about SSA determinations being a substitute for Plan action:

> The collective bargaining process is an ongoing process, and the parties are looking for ways to improve benefits in the system. Our new 88 Plan for players with dementia is one example. . . . Allowing Social Security determinations ***as a separate, alternate way to get total and permanent disability benefits*** is a second improvement.

Id. at 17 (emphasis added). Noticeably, Mr. Ell did not describe SSA determinations as advisory, or as only partially effective, but as "a separate, alternate way to get total and permanent disability benefits."

Such contemporaneous evidence of "the intent of the collective bargaining parties," *Giles*, 2013 WL 6909200, at *25, applies directly here. The NFL and the union changed the Plan – under pressure – to minimize the burden on players whose

disability was already established by an independent source. Because Social Security awards speak comprehensively about both the fact of disability and the date of its onset, they eliminate the need "to be examined by a Plan doctor." *Id.*

The Plan will presumably argue that, although it must accept the SSA's determination of TPD *status*, § 5.2(b) does not require the Plan to accept the SSA's determination of *when* that TPD status began. But the "what" part of the SSA's determination cannot be so easily separated from the "when" part of that decision. Indeed, the Social Security determination itself is an indivisible statement of disability ("I found you disabled as of October 29, 2008"). [AR-680]. And the drafters of § 5.2(b) did not apply a scalpel to this provision when characterizing it in 2007, but rather asserted that an SSA determination will "automatically" become the Plan's determination; that the "guidelines" for disability under Social Security will govern the Plan's disability determination; and that an SSA determination is an "alternate way to get total and permanent disability benefits." The Plan's insistence that it can peel off what often is (as in this case) the most important part of part of the SSA's decision (the date of onset) while retaining the rest (the fact of disability) is flatly inconsistent with that announced purpose.

Factor #3: The materials used to make the decision were inadequate, and did not support the result.

Defendants misused the evidence here in three distinct ways. **First**, under the Plan's Social Security provisions, any earlier finding about disability is not just presumptively, but conclusively, wrong. Thus, § 5.2(b) provides that a player found by SSA to be disabled and still receiving SSA benefits "*will be deemed* to be totally and

permanently disabled." Any contrary "evidence" about disability is necessarily irrelevant.

Despite these provisions, the Plan relied on exactly such "evidence": the assertion that its *2009* ruling was "incompatible with finding that [Mr. Solomon was] totally and permanently disabled prior to March 31, 2010." [AR-721]. But the 2009 finding relied on flawed evidence which did not consider – could not have considered – SSA's finding in *2011* that Mr. Solomon was totally and permanently disabled, and that his disability began no later than October 2008. In short, compared to the SSA's dispositive 2011 determination of disability, the Plan's reliance on its 2009 decision is clearly "inadequate."

Second, and independently, the Plan's reliance on its 2009 decision was an abuse of discretion because the issue is whether Mr. Solomon was disabled as of March 31, *2010* (not 2009), and the Plan's contrary finding was not "supported by substantial evidence." *Helton v. AT&T*, 709 F.3d at 359. As explained *supra*, p. 16-17, all but one of the more than half-a-dozen examinations conducted after 2009 had found Mr. Solomon to be completely disabled.[29] And although the Plan had the "authority to *weigh* conflicting evidence, it abuse[d] its discretion when it fail[ed] to *address*" that conflicting evidence. *Helton*, 709 F.3d at 359 (emphasis added). Here, the Plan's decisions never weighed, never came to grips with the overwhelming evidence that Mr. Solomon was disabled as of March 2010. [*See* AR-655, 704-05, 720]. This failure to weigh the evidence was itself an abuse of discretion.

[29] The sole outlier, Dr. Perry's 2011 report, was flawed because it wrongly assumed that Mr. Solomon put forth insufficient effort on the tests employed, when in fact he was hobbled by chronic pain. *See supra* p. 17 & n. 14.

Third, in determining the onset date for Mr. Solomon's disability, the Plan had a June 2010 report from Dr. Fernandez, the psychiatrist, which relied on a detailed neuropsychiatric examination and a battery of neuropsychological tests to conclude that Mr. Solomon was suffering from "[traumatic brain injury]-related memory loss and disinhibition," along with "depressive . . . and behavioral symptoms, [and] cognitive dysfunction as the result of" concussions and obstructive sleep apnea. Her June 2010 report linked these symptoms directly to Mr. Solomon's loss of a job in 2007. [Fernandez 6/11/10 Report (AR-763-78)]. In her August 2010 report, Dr. Fernandez explicitly described Mr. Solomon as disabled, and noted that the problems had been worsening "over the past 5-10 years." [Fernandez 8/23/10 Note (AR-781)]. The NFL Plan's own neurologist, Dr. DiDio, expressly endorsed these findings. [AR-615]

June 2010 is fewer than *three months* after the March 31, 2010 cutoff date for Mr. Solomon's Football Degenerative benefits, yet the NFL Plan refused to connect the dots and conclude that Mr. Solomon's disability reached back before 2010. *See* [AR-705] ("the record did not support a finding of [TPD] prior to March 31, 2010"). To reach that decision, the Plan would have to conclude that Mr. Solomon miraculously became totally and permanently disabled during that three-month period, *a conclusion without any medical or other support*. To the contrary, all the evidence suggested that Mr. Solomon lost his job in 2007 precisely because of "cognitive dysfunction" that worsened "over the past 5-10 years." Here too, the Plan's basis for concluding that Mr. Solomon's disability did not begin before March 2010 was wholly "inadequate."

Factor #4: The decision was inconsistent with other Plan provisions and with earlier interpretations of the Plan.

The Plan's decision flunks this test, because the Plan is already on record -- with the Fourth Circuit, no less – as using the Social Security Administration's "date of onset" findings to determine Plan benefits. In *Marshall v. Bert Bell Plan*, described above, the Plan sought to escape an earlier date of onset, just as it does here. In *Marshall*, unlike here, it suited the Plan to argue that Social Security determinations should be considered dispositive. Thus, as the Fourth Circuit recorded:

> At oral argument counsel for the Plan stated that the Board does not automatically award benefits on the first of the month after the first doctor's report finding total and permanent disability. *For example, when the record contains social security disability records or tax returns reflecting that an applicant is unable to work*, the Board has awarded benefits retroactively to the time when employment ended. [*Marshall v. Bert Bell Plan,* 261 Fed. Appx. 522 at 526 (emphasis added).]

It is hard to overstate the significance of this admission. To determine the date benefits should begin, the Plan normally relies on Social Security findings: unless, as in Mr. Solomon's case, those findings would support a higher benefit level. In that case (*i.e.*, *this* case), the Plan ignores those findings. A clearer example of abuse of discretion under *Booth* probably does not exist.

Factor #5: The decision-making process was neither reasoned nor principled.

When "[t]he Board fail[s] to apply a reasoned and principled decision-making process," using "the care, skill, and diligence of a prudent man," its decision must be reversed. *Stewart v. Bert Bell Plan*, 2012 WL 2374661, at *14 (entering judgment against the Plan for acting "without adequate explanation.").

The Plan's actions fell short of this standard. **First**, as explained above, the Plan had undisputed evidence that Mr. Solomon was completely disabled as of June 2010, when Dr. Fernandez prepared her first report. But in trying to determine whether Mr. Solomon was disabled fewer than three months before – at the March 31, 2010 cutoff – the Plan inexplicably ignored this proof.

Second, faced with Social Security's express findings about the date of Mr. Solomon's disability – findings that are "deemed" correct under the Plan Document, § 5.2(b) – the Retirement Board had only this to say: "such effective date decisions are not binding on the Plan." [AR-720]. This statement reflects no reasoning whatsoever; it is plainly not the sort of "adequate explanation" that *Stewart* requires. Instead, the Board relied on its denial of Mr. Solomon's disability claim in *2009*, even though that decision was – under § 5.2(b) – no longer valid.

Third, the Plan deliberately took steps, *supra* pp. 6-7, to prevent claimants from establishing the onset date of their disabilities. Defendants accomplished this by changing the Plan's forms so that physicians—even those *appointed by the Plan*—could not provide this vital information. Then, the Plan asserted that "the record did not support a finding of TPD" before March 31, 2010. [AR-702].

Although Mr. Solomon is not required to provide an *explanation* for the breakdown in the Retirement Board's decision-making process (it is enough to show that it happened), there is ample evidence to explain it here. Mr. Solomon sought benefits for his brain injuries – the Chronic Traumatic Encephalopathy caused by his years of playing pro football. And the NFL Plan has long been hostile to such claims. In the *Webster* case, for example, the Plan ignored unanimous medical evidence showing

the direct links between multiple concussions, brain damage, and inability to work. The Court found that the denial of benefits there to be "culpable conduct, if not bad faith," meaning "deliberate misconduct to harm another or advance one's self-interest." *Jani v. Bert Bell Plan* (D. Md.), 2005 US Dist. LEXIS 44331, at *3-4. After Judge Quarles' decision was affirmed on appeal, the head of the players' union announced that the Retirement Board would deny benefits again, if given the chance – exactly what happened here.

True, there are equal numbers of players' and team representatives on the Retirement Board. But here, the NFL (well known as the "League of Denial")[30] is *also* on record as denying the significance or even existence of CTE, dismissing it as based on "new science" and an "unknown" association with playing football. *See supra* p. 22. This sort of denialism – in the face of a consensus diagnosis of probable CTE by both the NFL Plan's hand-picked doctor, and Mr. Solomon's psychiatrist – is powerful evidence that the Retirement Board's decision was neither "reasoned" nor "principled." *Booth*, 201 F.3d at 342.

Factor #7: The Plan's decision was directly contrary to the external standard established by the SSA.

This factor asks whether the decision is consistent with "any external standard relevant to the exercise of discretion." *Booth*, 201 F.3d at 343. And here, the Plan's error is clear-cut. The Social Security Administration has already established an elaborate procedure and series of "external standards" for determining when an individual is totally disabled, and when that disability began. *See generally* 20 C.F.R., Part 404 and Subpart P, §§ 1501, *et seq.* (definition and determination of disability). Yet

[30] *See* http://www.pbs.org/wgbh/pages/frontline/league-of-denial/.

the Retirement Board did not even pay lip service to these long-standing procedures, noting only that "such effective date decisions are not binding on the Plan." [AR-720].

The Supreme Court has held that a plan administrator's "failure to reconcile its own conclusion that [a claimant] could work in other jobs with the Social Security Administration's conclusion that she could not" is evidence of abuse of discretion. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2347 (2008) (affirming Court of Appeals' ruling setting aside denial of disability benefits on this basis). *See also id.* at 2352 (abuse of discretion because the plan "ignored the [SSA's] finding in concluding that [the claimant] could in fact do sedentary work."). This factor counts powerfully in favor of a finding of abuse of discretion.

Factor #8: The Plan Administrator's motives for the decision are open to question.

Finally, *Booth* asks the court to examine "the fiduciary's motives and any conflict of interest it may have." 201 F.3d at 343. Here, the same evidence that tends to explain the Retirement Board's failure to use "a reasoned and principled decision-making process," *id.* at 342, is also evidence of motive under Factor #8. The Retirement Board has already been found by a judge of this Court to have acted with "culpab[ility] . . . , if not bad faith" or "deliberate misconduct," in denying a disability claim based on multiple concussions and CTE. *Jani v. Bert Bell Plan* (D. Md.), 2005 US Dist. LEXIS 44331, at *3, 4. This is more than enough evidence of "motive" for the NFL Plan's wrongful conduct.[31] The Supreme Court has held that once a conflict of interest

[31] The Supreme Court has held that an entirely separate *economic* conflict of interest also exists when the same entity both pays benefits and administers the plan. *Metropolitan Life v. Glenn*, 128 S. Ct. at 2348. There is a Circuit split as to whether this financial conflict of interest rule applies when the plan administrator, like the Retirement

has been identified, it "should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision." *Metropolitan Life v. Glenn*, 128 S. Ct. at 2351.

In *Jani*, Judge Quarles found that "Given the overwhelming evidence supporting [Mike] Webster's claim, the Plan's decision" denying him maximum benefits for multiple concussions and CTE was proof of misconduct. 2005 U.S. Dist. LEXIS 44331, at *4. That finding, plus the NFL and the players' union's defiant statements about refusing benefits for such claimants, supplies precisely the link suggested by the Supreme Court: "a higher likelihood that [the Plan's motive to deny the claim] affected the benefits decision." Glen, 128 S. Ct. at 2351. It thus provides yet another factor demonstrating an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, this Court should find that the NFL Plan's November 23, 2011 final decision was an abuse of discretion and should direct the Plan to pay Mr. Solomon Football Degenerative benefits retroactive to October 29, 2008, plus prejudgment interest.

Board here, is composed of equal numbers of employee representatives (the NFLPA, whose members receive the benefits), and employer representatives (the NFL, which funds the plan). *Compare Durakovic v. Building Svs. 32 BJ Pens. Fund*, 609 F.3d 133, 138-39 (2d Cir. 2010) (yes), to *Klein v. Central States Plans*, 346 Fed. Appx. 1, 5 (6th Cir. 2009) (no). The Fourth Circuit has not spoken, while several Judges in this District have found no conflict on these facts. *See*, *e.g.*, *Stewart v. Bert Bell Plan*, 2012 WL 2374661, at *14 n.33. Mr. Solomon believes that *Durakovic* was correctly decided, and that this provides an independent basis for finding a conflict of interest here, and thus for reversing the denial of benefits.

Respectfully submitted,

Dated: July 31, 2015

/s/ Cyril V. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2015, I caused a copy of the foregoing Memorandum in Support of Plaintiff's Motion for Summary Judgment thereto to be delivered via CM/ECF and regular mail to:

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2013 WL 6909200
United States District Court,
D. Maryland.

Jimmie V. GILES, Plaintiff,
v.
BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, Defendant.

Civil Action No. ELH–12–634. | Dec. 31, 2013.

MEMORANDUM OPINION

ELLEN LIPTON HOLLANDER, District Judge.

***1** This Court must resolve cross-motions for summary judgment in a dispute concerning disability benefits sought by Jimmie Giles, a retired National Football League player, from the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan"), an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), codified as amended at 29 U.S.C. §§ 1001 *et seq.* Through the Plan, Giles receives Total and Permanent ("T & P") disability benefits at the "Inactive" level. However, he claims that he should be classified in the "Football Degenerative" category, which would provide him with greater monthly benefits. Therefore, Giles seeks judicial review of the Plan's decision to award benefits to him at the lower level. *See* Complaint (ECF 1).

The cross-motions have been fully briefed, *see* ECF 63, 65, [1] and no hearing is necessary to resolve them. *See* Local Rule 105.6. For the reasons that follow, I will grant plaintiff's motion for summary judgment.

I. Background and Factual Summary

A. Background

The parties filed earlier cross-motions for summary judgment (ECF 40, 41), which were argued in open court. In a Memorandum Opinion of November 20, 2012, I denied both motions and remanded the matter to the Plan's Retirement Board for reconsideration. *See* ECF 49 (Memorandum Opinion) and ECF 50 (Order), *Giles v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 925 F.Supp.2d 700 (D.Md.2012) ("*Giles I*"). In a decision of March 27, 2013, the Retirement Board affirmed its denial of Football Degenerative benefits. Thereafter, plaintiff filed a request to reopen this case, ECF 52, which I granted. ECF 53. [2]

The underlying facts are fully recounted in *Giles I. See* ECF 49 at 2–22. As a result, I need not restate them here in their entirety. [3]

Giles was born in 1954. His NFL career included association with four franchises and spanned thirteen seasons, from 1977 until 1989. During that time, Giles generally weighed between 230 and 240 pounds.

The Plan was established pursuant to collective bargaining agreements between the NFL Players Association and the NFL Management Council to provide retirement, disability, and related benefits to eligible former professional football players and their beneficiaries. Giles first sought T & P disability benefits from the Plan in December 1995. Although that application was denied, Giles subsequently obtained early retirement benefits. On a later occasion, Giles again sought T & P disability benefits, but his application was denied because his receipt of early retirement benefits precluded his later application for T & P disability benefits. However, the Plan was subsequently amended to remove that limitation. Accordingly, in 2008 Giles filed another application for T & P disability benefits. It is that application which is at issue here. Ultimately, the 2008 application was granted, but at a lower level of benefits than that to which Giles contends he is entitled.

B. The Plan's Provisions for T & P Disability Benefits

***2** The Plan's T & P disability benefits are governed by Article 5. [4] Pursuant to Plan § 5.1, a player is entitled to a monthly T & P benefit if he is otherwise eligible and is determined to be "totally and permanently disabled as defined in section 5.2" of the Plan. In 1995, when Giles applied for T & P disability benefits, a player was considered "totally and permanently disabled" under the Plan only if he had "become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit," with some further qualifications that are not applicable here. Plan § 5.2(a). In the current version of the Plan, that standard is called the "General

Standard." In 1995, the General Standard provided the sole definition of "totally and permanently disabled."

Effective April 1, 2007, the Plan was amended as a result of collective bargaining between the NFL Players Association and the NFL Management Council. *See* Plan Mem. at 3; Giles Mem. at 5. Pursuant to the collective bargaining agreement, an alternative definition of "totally and permanently disabled" was added to the Plan, based on receipt of "Social Security Awards." Plan § 5.2(b). The Social Security Awards standard provides, *id.:*

> Effective April 1, 2007, a Player who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled, unless four voting members of the Retirement Board determine that such Player is receiving such benefits fraudulently and is not totally and permanently disabled.

Once a player is found to be totally and permanently disabled, regardless of the standard, the amount of the T & P disability benefit depends on the applicability of a particular benefits category: "Active Football," "Active Nonfootball," "Football Degenerative," or "Inactive." The latter two categories, "Football Degenerative" and "Inactive," are at issue in this case.

The "Football Degenerative" category applies "if the disability(ies) arises out of League football activities, and results in total and permanent disability before fifteen years after the end of the Player's last Credited Season." Plan § 5.1(c). In contrast, the Inactive category, which entails a lower monthly benefit, applies "if (1) the total and permanent disability arises from other than league football activities while the Player is a Vested Inactive Player, or (2) the disability(ies) arises out of League football activities and results in total and permanent disability fifteen or more years after the end of the Player's last Credited Season." Plan § 5.1(d).

The parties do not dispute that plaintiff's disability arose within fifteen years after his last credited season. Nor do they dispute that Giles is totally and permanently disabled. Rather, the dispute concerns Giles's classification. The issue as to Giles's category turns on whether his disability "arises out of League football activities," so as to qualify him for the Football Degenerative category of benefits. Plan § 5.1(c).

***3** Article 5 of the Plan does not include a definition of "arises out of League football activities." However, Plan § 6.4(c), relating to the "Line–of–Duty Disability" benefit, contains the following definition:

> "Arising out of League football activities" means a disablement arising out of any League pre-season, regular-season, or post-season game, or any combination thereof, or out of League football activity supervised by an Employer, including all required or directed activities. "Arising out of League football activities" does not include, without limitation, any disablement resulting from other employment, or athletic activity for recreational purposes, nor does it include a disablement that would not qualify for benefits but for an injury (or injuries) or illness that arises out of other than League football activities.

Both sides have agreed that the definition in Plan § 6.4(c) applies here. *See Giles I,* ECF 49 at 5. Moreover, in cases concerning T & P disability benefits, the definition taken from the "Line–of–Duty" section of the Plan has been applied by other courts. *See, e.g., Washington v. Bert Bell/Pete Rozelle NFL Ret. Plan,* 504 F.3d 818, 821 n. 4 (9th Cir.2007); *see also Johnson v. American United Life Ins. Co.,* 716 F.3d 813, 821 (4th Cir.2013) ("[A]mbiguous language in one portion of an ERISA plan may well be clarified by reference to unambiguous language in another portion of the plan.").

C. The 1995 Application and Subsequent Plan Amendments

As noted, Giles initially applied for T & P disability benefits in December 1995. As part of the application process, Giles was examined in November 1995 by Hugh Unger, M.D., F.A.C.S., who was selected by the Plan to conduct the examination. *See* JVG0034, JVG0045–50. In his report and in an accompanying letter to the Plan, Dr. Unger recounted Giles's lengthy history of injuries sustained while playing football and opined that Giles had a disability with respect to his back, ankles, and knees. JVG0045–50. Although Dr.

Unger concluded that Giles's disability was the result of injury sustained in football-related activity, JVG0050, he opined that Giles was "employable," and was not "totally disabled to the extent that he is substantially unable to engage in any occupation for any remuneration or profit." JVG0049. Dr. Unger stated: "I find no contraindication with the patient performing an occupation that precludes squatting, kneeling, climbing and lifting over 60 [pounds]." JVG0048.

In addition to Dr. Unger's report, Giles included with his application the reports of two other physicians, David Ascher and George Adams. Dr. Ascher conducted Giles's NFL end-of-career examination for purposes of disability evaluation. *See* JVG0043. Dr. Adams served as Giles's personal treating physician during the off-seasons from 1986 until Giles's retirement from football in 1989, and on a regular basis thereafter. *Id.*

Dr. Ascher's report was prepared on February 25, 1991, on the basis of a physical examination of the same date, conducted within two years of Giles's retirement. *See* JVG0019–26. At that time, Giles weighed 289 pounds. *See* JVG0023. Dr. Ascher recounted a detailed history of Giles's football injuries, *see* JVG0019–21, and also provided the following summary of his injury history with the various teams for which Giles had played, JVG0021:

> ***4** Houston: Injury to right ankle.
>
> Tampa Bay: Falling on shoulders at various times with injury to both. Injury to back when struck by another playing.
>
> Injury to left knee, 10th or 11th game, 1983.
>
> Injury to right knee, early in 1984 season.
>
> Tear of left quadriceps.
>
> Injury to neck, sternum, chest and left shoulder. Missed one game following this injury.
>
> Developed bunions on both feet.
>
> Dislocated right ring finger in a game in Hawaii.
>
> Was knocked unconscious at least three times.
>
> Detroit: All symptoms became worse due to artificial turf and cold weather.
>
> Philadelphia: Bunions. Neck and shoulder injury. Injury to left ankle.

Dr. Ascher described Giles's "present complaints" as including chronic pain and stiffness in his neck, shoulders, back, knees, and ankles. He stated, in part, JVG0022:

> [Giles's] low back is constantly painful.... He cannot sit for longer than an hour without stretching his legs out in front of him. Riding in a plane is extremely painful for his back and his knees. When he drives he must stop every hour or so in order to rest his back. He is able to walk for about a mile, by which time his back will become painful.

* * *

> Both knees are extremely painful. There is audible crepitation with any movement. His knees constantly feel tired. In February or March of 1990 his right knee gave way on him while he was walking. After any degree of prolonged sitting both knees become excruciatingly painful. He can no longer jog nor run because of his knees.... He cannot go up or down stairs without holding on to the railing.
>
> At home he is able to do very little. He does no yard work. He can take the trash out. He can hit a baseball to his kids and he even coaches Little League, but he cannot participate physically to any degree....

On the basis of his findings, Dr. Ascher opined that Giles had a "permanent and stationary" disability. JVG0024. Although Dr. Ascher indicated that Giles was "looking for work," he noted that Giles was "no longer able to play professional football." *Id.* According to Dr. Ascher, Giles was "a qualified injured worker": due to the injuries to his lower extremities, he was "precluded from heavy work" and "precluded from running, jumping, climbing, frequent stair climbing, walking on rough ground and carrying heavy weights." JVG0024–26.

As to the "cause" of the injury, Dr. Ascher stated: "Despite the particular, remembered injuries, which involve virtually the entire musculoskeletal system, this is a textbook picture of multiple stresses and strains and multiple traumata." JVG0024. Dr. Ascher also observed: "This man has had no injuries since he ceased playing football." JVG0026. Among the "reasons for [his] opinion," Dr. Ascher cited, *id.:*

- "The duties of a professional football player."

- "The duration of time that [Giles] played professional football, from 1977 to 1989. This is at least twice as long as the ordinary player stays with the game."

***5** • "That this man's history indicates multiple and repeated traumatic incidents, of greater and lesser extent. This follows the definition of cumulative trauma, with the whole resulting in the final disability which this man now has."

- "The duration of time that has elapsed since he ceased and desisted from playing professional football."

- "That there have been no intervening injuries."

- "That these conditions all became permanent and stationary at one and the same time, when he ceased and desisted from playing professional football."

Dr. Adams's report, dated November 16, 1995, was roughly contemporaneous with the examination performed by Dr. Unger. *See* JVG0037–39. Dr. Adams recounted Giles's history of injuries and his then-current complaints, and observed that Giles "lives the life of a semi-invalid due to his multiple injuries incurred in his long football career." JVG0037. He concluded: "In my professional opinion within reasonable bounds of medical probability, Mr. Giles is completely and totally disabled from multiple injuries incurred over his career in the National Football League." JVG0039.

Giles's 1995 application for T & P disability benefits was reviewed by the Plan's Retirement Board at its meeting of January 18, 1996. See JVG0054. The Retirement Board is composed of six voting members, three of whom are appointed by the NFL Players Association, and three of whom are appointed by the NFL Management Council. See Plan §§ 1.3, 8.1. The Plan vests the Retirement Board with "full and absolute discretion, authority and power to interpret, control, implement, and manage" the Plan and decide claims for benefits. Plan § 8.2. The Plan also states that the Retirement Board "will have the broadest discretion permissible under ERISA and any other applicable laws." Plan § 8.9. [5]

According to the Retirement Board's minutes of its meeting of January 18, 1996, Giles's application was referred "to the Medical Advisory Physician ['MAP'] in accordance with Plan section 8.3(a)." JVG0055. The MAP's determination of such a medical issue is final, although the Retirement Board otherwise retains its full interpretive authority. Plan § 8.3.

Alfred J. Tria, M.D., the Plan's MAP, examined Giles on February 29, 1996. He prepared a report of the examination, *see* JVG0058, as well as a "Physician's Report" in the form prescribed by the Plan (*i.e.*, the same form as the "Physician's Report" that was completed by Dr. Unger). *See* JVG0062–63. In addition, he wrote a letter to the Director of the Plan, dated March 3, 1996. *See* JVG0060.

In his "Physician's Report," Dr. Tria opined that Giles was partially disabled as to his back, ankles, and knees, but that Giles was capable of engaging in "sedentary" employment. JVG0062. In response to a question asking if Giles's "injuries resulted from football related activity," Dr. Tria answered in the affirmative. JVG0062–63. In his cover letter, Dr. Tria stated: "Mr. Giles has had multiple joint injuries over his years of football." JVG0060. However, he concluded: "I do not believe that he has enough objective findings to warrant the total and permanent disability." *Id.*

***6** Thereafter, at its meeting of April 18, 1996, the Retirement Board denied Giles's application for T & P disability benefits. *See* JVG0068–69. After a further review completed at Giles's request, the Retirement Board again denied the application on October 10, 1996. *See* JVG0078–79. In so ruling, the Board stated that Giles was "not substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, and consequently does not satisfy the requirements of Plan sections 5.1 and 5.2." JVG0079.

Subsequently, Giles applied for and received early retirement benefits under the Plan. JVG0122, JVG0137. At that time, acceptance of the retirement benefits rendered Giles ineligible for T & P benefits. Plan § 5.1 (indicating that a player who is "receiving retirement benefits" is ordinarily ineligible for T & P disability benefits).

As indicated, the Plan was subsequently amended to provide for an alternative method to qualify as "totally and permanently disabled," based on receipt of Social Security Awards. Plan § 5.2. In addition, the amendments to the Plan established a "Window Period," between April 1 and July 31, 2008, in which a player who had previously elected to receive early retirement benefits could apply for T & P disability benefits pursuant to the new Social Security Awards standard, notwithstanding the general provision barring applications

for T & P disability benefits by players receiving retirement benefits. *See* Plan § 5.8. [6]

D. Giles's 2008 Application for T & P Disability Benefits

On July 29, 2008, during the Window Period, Giles submitted a new application for T & P disability benefits under the Plan. JVG000216–21. As noted, it is this application that is in issue.

Among other materials submitted with his Window Period application, Giles provided a "Notice of Award" from the Social Security Administration ("SSA"), dated July 21, 2008, JVG000209–14, indicating that he was "entitled to monthly disability benefits beginning November 2006." The SSA's Notice of Award was silent as to the nature or cause of Giles's disability. *Id.* However, along with the Notice of Award, the SSA issued a "Disability Determination and Transmittal," which indicated that plaintiff was disabled as of November 1, 2004, and listed a primary diagnosis of "Disorders of Back (Discogenic and Degenerative)" and a secondary diagnosis of "Osteoarthrosis and Allied Disorders." JVG000729. As the "rationale" for the SSA's determination that Giles was disabled, the "Disability Determination and Transmittal" cited the SSA's Vocational Rule 201.14. *Id.* Under that rule, an individual is deemed disabled if he or she is limited to sedentary work, is between 50 and 54 years old, and has prior education and skills that are not transferable to skilled, sedentary employment. [7]

Giles also submitted a "Physical Residual Capacity Assessment" (the "SSA Assessment"), prepared by William Hand, M.D. on June 2, 2008. *See* JVG000198–205. In the SSA Assessment, Dr. Hand assigned Giles a "primary diagnosis" of "Obesity" and a "secondary diagnosis" of "cervical and lumbar" impairments, along with osteoarthritis in both knees. JVG000198. Dr. Hand noted that Giles weighed 383 pounds at the time of his examination. JVG000199. Further, he stated that Giles had "chronic cervical and lumbar pain" with "limited motion in the cervical and lumbar spine," and that his obesity "adversely affect [ed] the knee pain and the back pain." *Id.* Moreover, Dr. Hand found that Giles was limited to lifting no more than ten pounds and stated that Giles should be limited to standing for no more than a total of "one hour in an 8 hour day," noting that another physician's report that he had reviewed had indicated Giles could only stand for ten minutes at a time. JVG000199–200.

***7** In support of his Window Period application, Giles also included a report that he had submitted in connection with his application for Social Security disability benefits. It was the report of Darrell N. Blaylock, M.D., dated May 9, 2008, based on a physical examination conducted on May 5, 2008. *See* JVG000193–94.

Dr. Blaylock described Giles's history of football injuries and stated that Giles "felt that he had been disabled since 1990." JVG000193. Describing Giles as "morbidly obese," Dr. Blaylock observed that Giles weighed "in excess of 383 pounds" and indicated that his "current weight is apparently stable for the last four to five years." JVG000193–94. Dr. Blaylock iterated Giles's symptoms and range of motion, concluding: "In summary, this is a 53–year old man who apparently sustained multiple injuries while playing professional football.... He is currently taking a large amount of pain medication. I would suspect the only gainful employment he could be engaged in would be something where he sits for most of the time." *Id.*

Finally, Giles submitted a report from Sardha Perera, M.D., a specialist in pain management, dated March 13, 2006. JVG000189–92. This report was also submitted to the SSA in support of Giles's application for Social Security disability benefits. *See* JVG000240. According to Dr. Perera, Giles's "chief complaint" was "[c]hronic persistent back pain, neck pain, upper and lower extremity radicular pain, bilateral knee pain, essentially 18 years in duration." JVG000189. Dr. Perera noted that plaintiff weighed 360 pounds, and recommended that plaintiff "go on an aggressive weight reduction regimen." JVG000191.

Giles's Window Period application for T & P disability benefits was initially referred to the Plan's Disability Initial Claims Committee (the "Committee"). By letter dated September 8, 2008, the Plan's Benefits Coordinator, Paul Scott, informed Giles that the Committee had determined, in light of the "Notice of Award" from the SSA, that plaintiff qualified fo r T & P disability. JVG000227–29. But, the Committee determined that Giles qualified only for the Inactive category of T & P benefits, rather than the Football Degenerative category, because the SSA's Notice of Award did not "indicate the basis for [Giles's] Social Security award, and the Committee determined that it had insufficient information to grant ... a different category of T & P benefits." JVG000229.

Giles's counsel sent a letter to Sarah Gaunt, the Plan Director, dated January 8, 2009, appealing the classification of Giles's disability at the Inactive level, rather than as Football Degenerative. JVG000239–41. In the letter, plaintiff's counsel explained the SSA's Vocational Rule 201.14, noting that Giles was found to be disabled based on his "age (over 50), his education and residual functional capacity limited to sedentary work." *See* JVG000240–41.

The Retirement Board considered Giles's appeal at its meeting on February 12, 2009, but deferred judgment pending "further medical review." JVG000245–46. Months of discussion followed, with Giles initially refusing to undergo an additional examination on the ground that it was unnecessary and inappropriate in light of his SSA disability benefits award. JVG000250–51; *see Giles I*, ECF 49 at 16–18. Ultimately, on March 30, 2009, the Plan referred the matter to its Medical Director, Stephen S. Haas, M.D.

***8** In the referral, the Plan's Benefits Coordinator advised Dr. Haas: "In anticipation of a rescheduled neutral evaluation, the NFL [Players Association] and NFL [Management Council] have asked that you review the enclosed file and determine if there is sufficient evidence to support [a determination that] the Player's T & P disability is related to football." JVG000255. Dr. Haas provided his opinion in a letter dated April 8, 2009, stating, JVG000256:

I have reviewed the record of Mr. Giles.

> It is my opinion that some of the conditions for which he has been determined to be disabled, are definitely related to football. However, there is a significant element that is NOT football-related.
>
> That is his weight. The record shows that he weighed 230–240 pounds when he played. His weight in 2008 was recorded as "over 383."
>
> It is widely and unequivocally documented in the medical literature that obesity of this magnitude greatly exacerbates almost all medical conditions. This is especially true for spine and lower extremity conditions. Though many athletes may gain some weight after they discontinue formal training and conditioning programs, gains in excess of 150 pounds are far beyond even that seen in players who adopt a subsequent sedentary life style.
>
> There have to be significant elements of behavior patterns and tendencies unrelated to football that conspire with the acknowledged disabilities in the record to produce the whole picture of Mr. Giles' unfortunate situation....
>
> His disability cannot reasonably be attributed totally to football.

The Plan forwarded Dr. Haas's opinion to plaintiff's counsel on April 22, 2009, and reiterated the Plan's insistence that Giles be evaluated by a neutral physician. *See* JVG000257. However, Giles persisted in his refusal to be examined. The Retirement Board denied Giles's appeal in May 2009, based on his failure to comply with the Plan's examination procedures. JVG 000265–69.

Giles's counsel wrote to the Plan on January 20, 2010, acknowledging that, under retroactive regulations of which he had previously been unaware, the Plan was entitled to ask a retired player receiving Social Security disability benefits to submit to an examination. *See* JVG000270. In response, the Plan agreed to refer Giles to a neutral physician, Glenn Perry, M.D., who examined Giles on April 7, 2010. JVG000276–77. Dr. Perry concluded that Giles's "orthopedic injuries described in themselves do not qualify the player for permanent and total disability. However, the orthopedic conditions described did result from injuries sustained while playing football in the NFL." JVG000281.

At its meeting of May 13, 2010, the Retirement Board again considered Giles's appeal. JVG000287–88. By letter of May 18, 2010, the Board notified plaintiff that it affirmed the decision of the Plan's Disability Initial Claims Committee to award T & P benefits at the Inactive category. Noting that its decision was "[b]ased on the reports of Drs. Perry and Haas," the Board determined: "Mr. Giles has a combination of impairments, some related to NFL football and others not related to NFL football." Further, it "concluded that, accounting solely for his NFL football impairments and excluding the non-NFL football impairments, Mr. Giles would not be totally and permanently disabled." Therefore, it found that Giles was not entitled to Football Degenerative benefits, because "his total and permanent disability arises from other than League football activities." JVG000291. After the Retirement Board denied an August 2010 request to reopen the matter, *see* JVG000303, plaintiff filed suit. [8]

E. Initial Cross–Motions for Summary Judgment

***9** The parties' initial cross-motions for summary judgment, ECF 40, 41, were heard on May 31, 2012. ECF 45; *see also* ECF 62 (transcript of motions hearing of May 31, 2012). On November 20, 2012, this Court issued a Memorandum Opinion, remanding the matter to the Retirement Board for further consideration. *Giles I*, ECF 49; *see also* ECF 50 (Order).

In the Memorandum Opinion, I concluded that the Plan had abused its discretion in denying Football Degenerative benefits.[9] First, I found that it erred in requiring that, in order to qualify for Football Degenerative benefits, a player who meets the Social Security Awards standard must also satisfy the General Standard's requirement of a total inability to work, because such a requirement is contrary to the Plan's plain language. *Id.* at 37. Second, I determined that the Retirement Board improperly relied on the conclusions of Dr. Stephen Haas, the Plan's Medical Director, to determine that Giles's disability arose from his obesity rather than his football career. *See id.* at 35.[10] It was also unclear whether the Retirement Board had reviewed and considered two medical reports, prepared in connection with Giles's 1995 application, and which supported his position. *Id.* at 37–38. Accordingly, I remanded the matter for further consideration by the Board. *Id.* at 39.

F. The Retirement Board's Decision on Remand

In a letter dated March 27, 2013, signed by Sarah Gaunt, the Plan Director, on behalf of the Retirement Board, the Board again denied Giles's request for reclassification. JVG000751–56.

The letter acknowledged this Court's conclusion in *Giles I* that the Retirement Board's prior decision had " 'suffer[ed] from two fatal defects.' " JVG000753 (quoting ECF 49 at 32). But, the letter explained that, on remand, the Board had disregarded the statements of Dr. Haas, its former Medical Director, and confirmed that it had "reviewed the medical reports created in the prior application filed by Mr. Giles." JVG000753.

In addition, the letter explained that the Retirement Board had decided to obtain Giles's entire Social Security file, "which previously had not been made available." JVG00753. According to the Board, in evaluating the Social Security award, it had to identify the "but for" cause of Giles's Social Security disability award. *Id.* The Retirement Board reasoned that if "the 'trigger' for [Giles's] Social Security disability award arose out of League football activities," Giles should be reclassified to the Football Degenerative category. *Id.* In contrast, "where another condition" that is not football-related "is the 'but for' cause" of the disability, then the Inactive category would be appropriate. JVG000753–754. The letter said, in part, *id.:*

> The Retirement Board found that the collective bargaining parties, who have sole authority to define the Plan's benefits, did not intend for a Player who is limited to sedentary work because of League football activities, and who receives an award of Social Security disability benefits due to a later change in status defined solely by rules established by the Social Security Administration, to receive Football Degenerative benefits.
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> * * *
>
> ***10** The Retirement Board noted that ... the "but for" test requires the Retirement Board to grant Football Degenerative [benefits] where the football-related impairments actually caused the total and permanent disability, and to grant Inactive [benefits] where the other impairments caused the total permanent disability. So too here, the Retirement Board found, the correct interpretation of the Plan is to award Football Degenerative if the football-related conditions were the "but for" cause of the Social Security award, and to award Inactive where another condition is the "but for" cause.

The Retirement Board concluded that the "but for" cause of Giles's Social Security disability award was the "conjunction of [his] attainment of age 50 and [SSA] Medical Vocational Rule 201.14, which is the specific rule under which Social Security granted him disability benefits." JVG000754 (citing 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.14). Under Medical Vocational Rule 201.14, a claimant is eligible for a Social Security disability award where the individual (1) has a "work capacity" that is "limited to sedentary work as a result of severe medically determinable impairment(s)"; (2) is a "[h]igh school graduate or more," such that the education level "does not provide for direct entry into skilled work"; (3) is a "skilled or semi-skilled" worker whose "skills [are] not transferrable"; and (4) is "[c]losely approaching advanced age," *i.e.*, has reached age 50 but is not yet 55 years old. *See id.; see also* JVG000758 ("Disability Determination and Transmittal Form" for Giles, reflecting 201.14 classification).

Notably, the Board "concede[d] that Mr. Giles is limited to sedentary employment due to orthopedic impairments that *arise out of League football activities."* JVG000754 (emphasis added). It also recognized that plaintiff's "physical limitations are consistent with his work history." *Id.* However, the Board determined that plaintiff's "discontinuation of work activity did not trigger the Social Security award," as Giles apparently had "stopped working months before he became eligible for Social Security disability benefits." *Id.*

The Board also noted the various changes in plaintiff's Social Security onset dates, stating in the letter, JVG000755:

> Ultimately, the onset date was changed by a Social Security examiner to November 1, 2004, to coincide with the beginning of the month in which Mr. Giles reached age 50 (his date of birth was November 8, 1954). The Retirement Board noted that, had Mr. Giles not reached age 50, he would not have qualified for Social Security benefits. Specifically, Mr. Giles would not have been "closely approaching advanced age," and thus would have been classified instead within Medical Vocational Rule 201.21, a category that does not result in an award of benefits. 20 CFR Part 200, Appendix 2, Table 1, at 201.14. This is evidenced by the examiner's narrative entry of June 24, 2008, which reads: "Claimant is currently alleging 1/2/04 as his AOD [alleged onset date]. Per that AOD claimant would not meet the vocational requirement because of his age 1/1/04. Therefore claimant will be given 11/1/04 as this is when claimant meets the requirement for med/voc allowance given because of his age at this adverse onset." See Exhibit 4; see also Exhibit 6 (Explanation of Determination).

***11** Further, the letter explained, *id.:*

> The Retirement Board ... has never considered the mere passage of time or aging, without a worsening or degeneration of the underlying football-caused medical impairments, to "arise out of League football activities." It also determined that attainment of age 50 was a precondition to Mr. Giles' award of Social Security benefits that bears no relation to League football activities. Rather, it relates solely to a set of rules promulgated by the Social Security Administration for adjudicating claims under the Social Security disability program. The Retirement Board concluded that the intent of the collective bargaining parties was to classify a Player in the Inactive category where there is a clear, non-football cause of eligibility.

Following the Retirement Board's decision on remand, plaintiff's counsel expressed concern that the Board had not fully considered all of the relevant documents in rendering its decision. *See* Plan Mem. at 12 & Exh. 1 (ECF 65–2). At its meeting in May 2013, the Retirement Board reviewed its decision of March 27, 2013, but declined to alter it. ECF 65–2.

G. Pending Cross–Motions for Summary Judgment

In moving for summary judgment, plaintiff argues that the Retirement Board's denial on remand is contrary to both *Giles I* and the plain wording of the Plan. Giles Mem. at 3. Giles emphasizes that, in the Board's letter of March 27, 2013, the Board "conceded that Plaintiff was limited to sedentary employment due to orthopedic impairments that arose out of League football activities," Giles Mem. at 2–3 (citing JVG000754); *see id* at 4, 9; Giles Reply at 3, 5–6, 8. Thus, Giles contends that he "has established that he has met the qualifications for entitlement to football degenerative benefits." Giles Mem. at 4; *see* Giles Reply at 8.

Plaintiff challenges on several grounds the Plan's reliance on his age as a reason for denying Football Degenerative benefits. Age is one of several factors the SSA used to determine whether disability benefits are warranted. But, plaintiff maintains that the Plan has adopted a novel and unsupported position in applying the "arises out of League Football activities" requirement not only to the medical condition giving rise to his disabled status, but also to his age. *See* Giles Mem. at 9–10; Giles Reply at 3. As plaintiff notes, the Retirement Board insists that the collective bargaining parties, who defined the Plan's scope, intended to bar a former player limited to sedentary work due to football from receipt of Football Degenerative benefits, where the player qualifies for Social Security disability benefits based on a change in status under the SSA's rules governing disability benefits. *See* Giles Mem. at 8 (citing JVG000753); Giles Reply at 6 (same). According to plaintiff, the Retirement Board has offered no support for that position. *See id.* In his view, the Plan's provisions do not support such a limitation on players who qualify for Plan benefits under the Social Security Awards standard. *See id.*

***12** Furthermore, Giles asserts that the Plan's decision to apply the "arises out of League Football activities" test to his age was untimely, coming four years after the Plan learned that plaintiff's age contributed to his Social Security

disability award. Giles Mem. at 5 (citing JVG000240, letter from Giles's counsel to Plan, dated January 8, 2009); *see also* JVG000206–08 (Vocational Analysis Worksheet reflecting age and other criteria). This "completely different interpretation" of that phrase, he says, constitutes an improper *post hoc* rationalization for denying Football Degenerative benefits. *See* Giles Reply at 3–4.

In addition, plaintiff argues that the Plan has yet to consider materials that it was required to review, citing the lack of date stamps on several early medical reports. Giles Mem. at 4. Instead, argues Giles, the Retirement Board chose to review Giles's Social Security file, despite the lack of any request by the Court that it do so. *See* Giles Reply at 5.

Giles also insists that the denial is contrary to ERISA regulations found at 29 C.F.R. § 2560.503–1(g), which are reflected in the Plan. *See* § 11.6(a)(3) and (5). Giles Mem. at 6. According to plaintiff, the Plan ran afoul of those provisions by failing to inform him before the March 2013 denial either that age was a factor or that he would need to meet the Plan's General Standard in order to obtain Football Degenerative benefits. *See id.* at 6–9.

In its cross-motion, the Plan maintains that the Retirement Board acted within its discretion in concluding that the "trigger" for a player's total and permanent disability must "arise from League football activities," and that the SSA award does not establish that Giles met that criterion. *See* Plan Mem. at 1–2, 5. The Plan contends that the Board properly examined Giles's Social Security file in order to identify the "but for" cause of his Social Security award. *See id.* at 9. In the Plan's view, the Social Security record demonstrates that Giles's disability was triggered not by League football activities, but instead by his reaching the age of 50. Therefore, it insists that Giles is not entitled to Football Degenerative benefits. *See id.* at 5, 10–11, 15.

Further, the Plan states that it complied with *Giles I* in assessing Giles's claim on remand. It points out that, in reconsidering Giles's claim, the Board disregarded the statements of Dr. Haas, Plan Mem. at 8 (citing JVG000256, 754) and 14 (same), while reviewing and considering the reports of Dr. Tria and Dr. Unger, who had examined Giles in connection with his 1995 application for benefits. *Id.* at 8, 14; Plan Reply at 9–10.

The Retirement Board's decision, the Plan emphasizes, was reasonable, supported by substantial evidence, and consistent with the intent of the collective bargaining parties. *See* Plan Mem. at 15–18; *see also* Plan Reply at 4–5. It concludes that, under the applicable standard of review, this Court should not disturb the Board's determination. *Id.* at 18–20.

***13** Additional facts are included in the Discussion.

II. Discussion

A. Standard of Review

As a participant in a plan covered by ERISA, plaintiff is entitled to bring an action "to recover benefits due to him under the terms of his plan." ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). When reviewing a denial of benefits under an ERISA-governed plan, a district court must first determine "whether the relevant plan documents confer discretionary authority on the plan administrator." *DuPerry v. Life Ins. Co. of N. Am.*, 632 F.3d 860, 869 (4th Cir.2011). Under Section 8.2 of the Plan, the Retirement Board is designated as the " 'named fiduciary' of the Plan within the meaning of section 402(a)(2) of ERISA," and is granted the authority to interpret and construe the terms of the Plan.

When, as here, an ERISA plan vests its administrator or another fiduciary (in this case, the Retirement Board) with discretionary authority to construe the terms of the plan and determine eligibility for benefits, the plan's eligibility determination is subject to review only for abuse of discretion. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111–15, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 819 (4th Cir.2013); *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 630 (4th Cir.2010); *Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F.Supp.2d 682, 689 (D.Md.2011). In reviewing a plan's determination under the deferential abuse of discretion standard, a court is limited to the evidence known to the plan administrator when it rendered the decision under review. *Helton v. AT & T Inc.*, 709 F.3d 343, 352 (4th Cir.2013); *see also Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 125 (4th Cir.1994) (reviewing court may consider only information before plan administrator at the time decision was made); *Brodish v. Fed. Express Corp.*, 384 F.Supp.2d 827, 833 (D.Md.2005) ("Generally, the Fourth Circuit defines the administrative record as those facts known

to the administrator at the time the administrator made the benefits eligibility determination.").

The standard of review in the ERISA context "equates to reasonableness: [A court] will not disturb an ERISA administrator's discretionary decision if it is reasonable." *Evans v. Eaton Corp. Long Term Disability Plan,* 514 F.3d 315, 322 (4th Cir.2008) (citations omitted). "At its immovable core," the standard requires that a court "not reverse merely because it would have come to a different result in the first instance." *Id.* Thus, a reviewing court may not overturn a benefit decision that results from a " 'deliberate, principled reasoning process' " and that "is supported by 'substantial evidence,' " even if the court "would reach a different decision independently." *Helton,* 709 F.3d at 351 (citation omitted).

Substantial evidence is such relevant and probative evidence that a reasonable mind would accept as adequate to support a particular conclusion. *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Consolo v. Fed. Maritime Comm'n,* 383 U.S. 607, 619–20, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); *Marine Repair Services, Inc. v. Fifer,* 717 F.3d 327, 334 (4th Cir.2013); *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 207–08 (4th Cir.2000). The substantial evidence standard requires more than a mere scintilla, but less than a preponderance of the evidence. *See Richardson,* 402 U.S. at 401; *Consolo,* 383 U.S. at 620; *Marine Repair Services, Inc.,* 717 F.3d at 334; *Ashland Facility Operations, LLC v. N.L.R.B.,* 701 F.3d 983, 989 (4th Cir.2012). It "does not mean a large or considerable amount of evidence[.]" *Pierce v. Underwood,* 487 U.S. 552, 564–65, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Nor is it the court's function to reweigh the evidence. *Consolo,* 383 U.S. at 620; *see also, e.g., Radford v. Colvin,* 734 F.3d 288, 2013 WL 5790218, at *7 (4th Cir. Oct.29, 2013); *Westmoreland Coal Co., Inc. v. Cochran,* 718 F.3d 319, 324 (4th Cir.2013).

***14** In *Booth v. Wal–Mart Stores, Inc. Assocs. Health and Welfare Plan,* 201 F.3d 335, 342–43 (4th Cir.2000), the Fourth Circuit outlined eight factors to consider in evaluating the reasonableness of a benefit decision:

> (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decisionmaking process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

Regarding the first factor, which pertains to a plan's language, a claimant's entitlement to benefits "turn[s] on the interpretation of the terms in the plan at issue." *Firestone Tire,* 489 U.S. at 115. "Courts construe ERISA plans, as they do other contracts, by 'looking to the terms of the plan' as well as to 'other manifestations of the parties' intent.' " *US Airways, Inc. v. McCutchen,* —— U.S. ——, 133 S.Ct. 1537, 1549, 185 L.Ed.2d 654 (2013) (quoting *Firestone Tire,* 489 U.S. at 113).

An ERISA plan "administrator's discretion never includes the authority 'to read out unambiguous provisions' contained in an ERISA plan." *Blackshear v. Reliance Standard Life Ins. Co.,* 509 F.3d 634, 639 (4th Cir.2007) (quoting *Colucci v. Agfa Corp. Severance Pay Plan,* 431 F.3d 170, 176 (4th Cir.2005), *cert. denied,* 547 U.S. 1148, 126 S.Ct. 2300, 164 L.Ed.2d 815 (2006)), *abrogated on other grounds by Metropolitan Life Ins. Co.,* 554 U.S. at 116; *accord Savani v. Washington Safety Mgmt. Solutions, LLC,* 474 F. App'x 310, 314 (4th Cir.2012) (per curiam). Indeed, to ignore the plain language of the plan "constitutes an abuse of discretion." *Blackshear,* 509 F.3d at 639; *accord Day v. AT & T Disability Income Plan,* 685 F.3d 848, 853 (9th Cir.2012) (" 'ERISA plan administrators abuse their discretion if they ... construe provisions of the plan in a way that conflicts with the plain language of the plan.' ") (citation and some internal quotations marks omitted); *Edwards v. Briggs & Stratton Ret. Plan,* 639 F.3d 355, 362 (7th Cir.2011) (" '[U]nambiguous terms of a[n] [ERISA] plan leave no room for the exercise of interpretive discretion by the plan's administrator.' ") (citation omitted); *Admin. Comm. of Wal–Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Gamboa,* 479 F.3d 538, 542 (8th Cir.2007) ("An interpretation that conflicts with the plain language of a health and welfare plan is an abuse of discretion ....").

B. Preliminary Matters

Before reaching the heart of the parties' dispute, several preliminary issues must be addressed.

First, plaintiff cites a lack of recent date stamps on certain documents as evidence that the Retirement Board did not actually review them. Giles Mem. at 4 (citing JVG000432–733; 735–40; 743–48; 758–74). As plaintiff correctly notes, I explained in *Giles I* that because copies of medical reports prepared in connection with the 1995 benefits application had no date stamps later than 1996, it was not apparent whether the Board considered them in connection with the 2008 benefits application. ECF 49 at 37. But, I made clear that, on remand, these medical reports were to be taken into consideration.

***15** The Plan asserts that, on remand, the Retirement Board reviewed and considered the reports of Dr. Tria and Dr. Unger that dated from the 1995 application. Plan Mem. at 8, 14; *see also* JVC000753. Indeed, the Retirement Board expressly indicated that it complied with my instructions. JVG000753. To that end, the Retirement Board's denial letter of March 27, 2013, referred to Dr. Tria's examination and attached that report as an exhibit. JVG000754, 759–63 (Exh. 2). I am satisfied that the Board complied with my directive.

Second, plaintiff complains that the Retirement Board's decision contravened the requirements of an ERISA regulation found at 29 C.F.R. § 2560.503–1(g). Giles Mem. at 6–9. That provision requires an adverse benefit determination to include, *inter alia*, a "description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary[.]" 29 C.F.R. § 2560.503–1(g) (1)(iii). Under the regulation, certain plans must also provide any "internal rule, guideline, protocol, or other similar criterion [that] was relied upon in making the adverse determination," or must advise the claimant that a copy of such authority is available free of charge. *Id.* § 2560.503–1(g)(1)(v)(A).

The ERISA regulation is incorporated into Plan § 11.6(a)(3) and (a)(5). Specifically, the Plan provides that a notice of an adverse determination will contain "a description of additional material or information, if any, needed to perfect the claim and the reasons such material or information is necessary [,]" Plan § 11.6(a)(3), as well as "any internal rule, guideline, protocol, or other similar criterion relied on in making the determination (or state that such information is available free of charge upon request) [.]" *Id.* § 11.6(a)(5).

In support of his argument, Giles relies on the Retirement Board's purported failure to notify him, prior to its letter of March 27, 2013, either that his age was an issue or that, under the Plan's reading, he might have to qualify under the Plan's General Standard to receive Football Degenerative benefits. *See* Giles Mem. at 6. As a result, plaintiff maintains that he was precluded from pursuing a Social Security appeal, through which he might have been able to establish an inability to perform even sedentary work. *See* Giles Mem. at 6–9. Here, however, that possibility seems remote. At a hearing before this Court on May 31, 2012, plaintiff's counsel indicated that Giles could perform sedentary work. ECF 62 (transcript of motions hearing of May 31, 2012) at 22 ("Giles can do sedentary work."); *see also, e.g., Giles I*, ECF 49 at 33 (noting that "Giles is capable of performing sedentary work"). Accordingly, plaintiff has not shown that he was prejudiced through any failure of the Plan to inform him that age was a relevant factor. *See* Giles Mem. at 6. Unless a party can show " 'a causal connection between [an ERISA procedural defect] and the final denial of a claim,' " there can be no abuse of discretion based on a violation of 29 C.F.R. § 2560.503–1. *See Donnell v. Metropolitan Life Ins. Co.*, 165 F. App'x 288, 296–97 (4th Cir.2006) (citation omitted).

***16** Third, plaintiff insists that the Plan has improperly offered a *post hoc* justification for the denial, of a type that other courts have rejected. As plaintiff explains, for four years the Plan consistently interpreted the phrase "arises out of League football activities" to refer to the medical condition giving rise to Giles's Social Security disability award. Giles Reply at 3. But, in the letter of March 27, 2013, the Retirement Board offered a new interpretation of "arises out of League football activities" that no longer focuses solely on a player's underlying medical condition. *Id.* Instead, plaintiff says, the Plan has taken the position that "turning age 50 was the reason the [SSA] granted Giles' claim, and turning age 50 is not connected to League Football activities." *Id.* at 2. According to plaintiff, by relying for the first time on his age category, a factor that the SSA considered in rendering his Social Security disability award, the Plan improperly invoked a *post hoc* rationalization for its prior benefits denial. *See id.* at 3–4.

The ERISA cases that plaintiff cites, however, do not squarely support his position. That is because they involve information or arguments that, unlike the explanation that the Retirement Board provided to Giles in the letter of March 27, 2013,

were absent from the administrative record and instead first appeared only during litigation. In *Glista v. Unum Life Ins. Co. of America*, 378 F.3d 113 (1st Cir.2004), for instance, the First Circuit concluded that, under the circumstances presented, a plan administrator was barred from raising a new argument during litigation that was not articulated previously to the claimant. *See id.* at 131. *See also Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 397 (5th Cir.1998) (administrator could not rely on argument raised for first time during litigation); *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 790 (4th Cir.1995) ("A plan administrator cannot introduce evidence *post hoc* to support its benefit determination when the district court reviews that decision under a deferential standard."); *Berry v. Ciba–Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir.1985) (district court erred in admitting evidence not before the plan administrator).

As discussed, *infra*, the Retirement Board offered a new justification for the denial of Football Degenerative benefits in its letter of March 27, 2013. Nevertheless, this is not a situation in which, as in *Glista*, a plan's justification was wholly absent from the administrative record and instead first appeared during post-denial litigation. Plaintiff has cited no authority recognizing a categorical rule that bars a plan administrator on remand from relying on a new reason to support a prior benefits decision, nor is the Court aware of any cases indicating as much. To be sure, belated arguments or inconsistencies might undermine the persuasive weight of a plan administrator's justification on remand. Plaintiff, however, has identified no bar on *post hoc* rationalizations applicable to the circumstances presented here.

C. Football Degenerative Benefits and the Social Security Award Standard

***17** The remaining issue is whether the Retirement Board abused its discretion in denying Football Degenerative benefits on the ground that because Giles's Social Security disability award was "triggered" by his reaching the age of 50, his disability did not "arise[ ] out of League football activities" within the meaning of the Plan. As explained below, under the circumstances attendant here, the denial on this basis constituted an abuse of discretion.

Two aspects are central to my conclusion: a factual concession made by the Plan, and the structure of the Plan's benefits determinations. Regarding the first aspect, the Retirement Board, on remand, "concede[d] that Mr. Giles is limited to sedentary employment due to *orthopedic impairments that arise out of League football activities.*" JVG000754 (emphasis added). That admission is striking, evidencing that the Plan abandoned its core argument prior to remand: namely, that Giles's disability resulted from his obesity, not from injuries sustained during his professional football career. *See, e.g.*, JVG000289–92 (denial letter of May 18, 2010); *Giles I*, ECF 49 at 28, 34–35 (discussing Plan's reliance on Giles's obesity as cause of his disability). Indeed, noticeably absent from the Retirement Board's denial letter of March 27, 2013, is any reference to Giles's obesity. JVG000751–56; *see also* Plan Mem. at 14 (noting lack of reference to obesity in letter). Nor does the Board cite any factor, beyond Giles's professional football career, that contributed to his medical condition. *See* JVG000751–56. Instead, the Board pivots to a new rationale, premised on the basis for the award of Social Security disability benefits to Giles.

Assessing the Retirement Board's denial requires a clear understanding of how the Plan structures its benefits decisions. As explained, *infra*, this determination is a two-step process. First, the player must qualify as totally and permanently disabled, either under the General Standard, Plan § 5.2(a), or the Social Security Awards standard, Plan § 5.2(b). Second, if a player is found to be totally and permanently disabled, the level of benefits must be determined under criteria found in Plan § 5.1. As I summarized previously in *Giles I*, ECF 49 at 34:

> [T]he provisions of the Plan make clear that there are two alternative methods—the General Standard under Plan § 5.2(a) and the Social Security Awards standard under Plan § 5.2(b)—by which a player may demonstrate that he is totally and permanently disabled. Once the player has done so, the method by which the player established his disability is irrelevant to the level of benefit to which he is entitled. Rather, pursuant to Plan § 5.1, the level of benefits hinges on whether the player's established disability arose out of League football activities.

Plan § 5.8(b)(1), which recognizes the Social Security Awards path to qualifying for T & P disability benefits, is silent as to the level of T & P benefits (Football Degenerative,

Inactive, or otherwise) to which the player is entitled. *See* Plan Mem. at 4 n. 12. When, as here, the issue is whether a player found eligible for T & P benefits qualifies for Football Degenerative benefits or, instead, for Inactive benefits, the answer turns solely on whether the player's disability "arises out of League football activities." *See* Plan § 5.1(c)-(d). The Plan explains, Plan Mem. at 4:

> ***18** Under the Applicable Plan provisions, a player's receipt of SSA disability benefits means only that the Board should deem the player totally and permanently disabled. Once that determination is made, the Board must then apply the relevant Plan provisions to determine which categories of T & P benefits the player should receive.

1. Step One: T & P Eligibility

The first step of the analysis requires the Retirement Board to determine whether a player qualifies for T & P disability benefits. As indicated, a player may do so under either of two standards: the General Standard or the Social Security Awards standard. *See* Plan § 5.2. There is no dispute that Giles is totally and permanently disabled, based on his receipt of Social Security disability benefits. The Plan has granted and continues to pay Giles T & P disability benefits. Again, the question here is the category of T & P disability benefits—Football Degenerative or Inactive.

For Social Security disability applicants who, like Giles, remain capable of performing sedentary work, the individual's age is one component of the SSA's disability determination. 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(a) (addressing disabilities that "cannot be evaluated [based] on medical considerations alone"). In the context of those disabilities, the starting point for Social Security's eligibility determination is the individual's "residual functional capacity." *See id.* § 200.00(c) and Table 1. SSA regulations describe "residual functional capacity" as "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs[.]" *Id.* § 200.00(c). For an individual (such as Giles) whose "residual functional capacity" allows for sedentary work, the Social Security formula relies on three "vocational factors"—"age, education, and work experience"—to determine whether disability benefits are warranted. *Id.* § 201.00(a); Table 1. [11]

The age categories applicable to individuals limited to sedentary work include "advanced age" (55 and over); "closely approaching advanced age" (50–54), which is the category into which Giles fell; "Younger individual age 45–49"; and "Younger individual age 18–44 ." *See id.* Table 1; *see also id.* § 201.00(g) and § 202.00(d). As governing SSA regulations explain, "[i]ndividuals approaching advanced age (age 50–54) may be significantly limited in vocational adaptability if they are restricted to sedentary work. When such individuals have no past work experience or can no longer perform vocationally relevant past work and have no transferable skills, a finding of disability normally obtains." *See id.* § 201.00(g).

Of import here, the SSA was not required to determine whether Giles's "residual functional capacity" resulted from his professional football career or, instead, from some other cause. Simply put, causation was not relevant to the SSA's disability determination. Rather, once the SSA confirmed that Giles's "residual functional capacity" limited him to sedentary work, the only remaining question was whether his "vocational factors" of age, education, and work experience qualified him for disability benefits. *See id.* § 201.00(a); Table 1.

***19** Plan § 5.2 recognizes receipt of Social Security disability awards as a basis for T & P eligibility, and the Plan has accepted Giles's eligibility for T & P benefits. *See, e.g.*, Plan Mem. at 6 . [12] Likewise, Plan § 5.8(b)(1) confirms that, where certain timing requirements not in doubt here are met, "[a] ... player will be deemed totally and permanently disabled for all months in which he receives disability benefits from either the Social Security disability insurance program or Supplemental Security Income program [.]" In other words, the plain language of Plan § 5.2(b) and § 5.8(b)(1) reflects an intent to grant total and permanent disability status to all players receiving valid Social Security benefits. *See id.* Neither of these provisions, however, informs the level of T & P benefits due to a player who qualifies as totally and permanently disabled pursuant to the Social Security Awards standard. The only question here is the level of benefits to which Giles is entitled.

2. Step Two: Level of T & P Benefits Due

The second step of the benefits analysis requires the Retirement Board to determine the appropriate level of T & P benefits. *See* Plan § 5.1. As noted several times, the issue here is whether Giles is entitled to Football Degenerative benefits under Plan § 5.1(c), or Inactive benefits under Plan § 5.1(d). That determination depends entirely on whether Giles's "disability(ies) arises out of League football activities." *See* Plan § 5.1(c)-(d). That matter was never addressed by the SSA.

Plan § 6.4(c) defines "arising out of League football activities" as "a disablement arising out of any League pre-season, regular-season, or post-season game, or any combination thereof, or out of League football activity supervised by the Employer, including all required or directed activities." [13] That provision also contains three exclusions, under which a disability will not be found to "arise[ ] out of League football activities." Plan § 6.4(c). The first two define "arising out of League football activities" to exclude "any disablement resulting from other employment" or from "athletic activity for recreational purposes[.]" *Id.* Those two exclusions are not pertinent here. The third exception states that " '[a]rising out of League football activities' does not include ... a disablement that would not qualify for benefits but for an injury (or injuries) or illness that arises out of other than League football activities." *Id.; see also* Plan Mem. at 1, 5; Plan Reply at 4–5 (quoting third exception).

The parties offer conflicting interpretations of this test for whether a "disability" is one that "arises out of League football activities." In essence, the parties disagree as to the meaning of the term "disability" as it is used in Plan § 5.1. [14] In Giles's view, the relevant question is whether a player's "*medical condition*" that resulted in a Social Security award "arises out of League football activities." *See* Giles Mem. at 9 (emphasis in original). Under Giles's reading, the term "disability" refers to the player's physical condition. By contrast, according to the Plan, it is insufficient for a player's injuries to have "arise[n] out of League football activities." Instead, the factor that "triggers" a player's eligibility for a Social Security disability award also must have "arise[n] out of League football activities." *See, e.g.*, Plan Mem. at 1; JVG000753 (letter of March 27, 2013). In other words, the Plan asserts that "disability" means not only a player's physical impairment, but also his status as disabled pursuant to Social Security criteria.

a. Evolving interpretations of the Plan

***20** The Plan—at least before its decision on remand—had endorsed an interpretation equivalent to the one now advanced by Giles. Specifically, the Plan consistently argued that the level of T & P benefits turns on whether a player's "injuries" or "inability to work" "arises out of League football activities." Examples of that interpretation are legion. *See* ECF 40–1 (Plan's "Memorandum of Law in Support of its Motion for Summary Judgment," April 20, 2012) at 1 ("The basic issue in this case is whether [Giles's] present inability to work 'arises out of' NFL football."), 2 ("the Retirement Board was forced to conclude that Mr. Giles' inability to work does not arise from NFL football. He therefore receives disability benefits in the 'Inactive' category, rather than the higher 'Football Degenerative' benefits he seeks."), and 16 ("the Board scheduled Mr. Giles for a medical examination with a neutral physician ... because there was no affirmative evidence in Mr. Giles' medical record demonstrating that his present *orthopedic injuries arose from football"*) (emphasis added).

Counsel for the Plan reiterated this argument at the motions hearing held on May 31, 2012. *See, e.g.*, ECF 62 (Transcript) at 69 ("[T]he total and permanent disability is not football related if the player would not qualify for benefits but for an injury or injuries that arise out of other than NFL league activities. So we would submit that that primary diagnosis of obesity would render Mr. Giles ineligible for the football degenerative benefits."). Moreover, in a post-hearing memorandum dated June 11, 2012, the Plan stated: "To be entitled to a higher level of total and permanent disability (T & P) benefits, [Giles's] inability to work must 'arise out of League Football activities' within the meaning of the Plan." ECF 48 at 1.

Critically, in applying that formulation of the "arises out of League football activities" test, the Plan consistently sought to determine whether Giles's physical condition "ar[ose] out of League football activities." *See, e.g.*, JVG000247 (letter from Board to Giles dated February 23, 2009, stating that Board "tabled its consideration of your appeal to allow additional time for you to be evaluated by the neutral physician and for the neutral physician to complete his report"); JVG000268 (letter from Board to plaintiff's counsel dated May 28, 2009, explaining the need for a physical examination of Giles "to help assess the causation issues involved in the appeal" and observing that "it does not have

any recent, thorough medical reports" in its possession); ECF 40–1 at 11 (noting that in May 2009 the Board observed that it lacked " 'any recent, thorough medical reports' that would support a determination that Mr. Giles' disabilities arose out of NFL football activities."); ECF 42 (Plan's Reply of May 16, 2012) at 2 (discussing need for a physical examination to determine whether Giles's "inability to work arises out of NFL football" alone or also from his obesity). In stark contrast, the record—at least before the denial letter of March 27, 2013—is devoid of suggestion that assessing whether a "disability" (or an "inability to work") "arises out of League football activities" required the Plan to examine the basis for Giles's eligibility status under the Social Security criteria.

***21** In its decision on remand, however, the Plan abandoned its argument that the medical condition limiting Giles's ability to work resulted from anything other than his NFL career. As indicated, in its letter of March 27, 2013, the Retirement Board "concede[d] that Mr. Giles is limited to sedentary employment due to orthopedic impairments that arise out of League football activities." JVG000754; *see* Giles Mem. at 2–3.

Nevertheless, the Plan has not accepted Giles's eligibility for Football Degenerative benefits. In essence, the Plan seeks to redefine the test for determining whether a "disability" is one that "arises out of League football activities." The Plan insists that, in order to qualify for Football Degenerative benefits, it is not enough for a player's injuries to have "arise [n] out of League football activities"; the player's *status* as disabled pursuant to the Social Security disability classification scheme *also* must have "arise[n] out of League football activities." As the Retirement Board explained, it "would reclassify Mr. Giles to the Football Degenerative category if the trigger for his Social Security award arose out of League football activities, but deny reclassification otherwise." JVG000753 (letter of March 27, 2013). Applying this new formulation of the test, the Plan concluded that because Giles qualified for Social Security disability benefits only because he reached the age of 50, his disability cannot be said to "arise[ ] out of League football activities," and thus he is ineligible for Football Degenerate benefits. *See, e.g.*, Plan Mem. at 15; Plan Reply at 5.

Before addressing other defects in the Plan's argument, I note that the Plan could have raised this argument years ago—and, if it had merit, could have simplified the denial of Football Degenerative benefits. As the administrative record reflects, the Plan knew since as early as January 2009 that Giles's Social Security award arose under Vocational Rule 201.14. *See* JVG000239–41; JVG000206. In a letter to Plan Director Sarah Gaunt dated January 8, 2009, plaintiff's counsel laid out the basis for Giles's Social Security award. JVG000240–41. In particular, he explained, *see id.:*

> [B]ased upon Mr. Giles' age (over 50), his education and residual functional capacity limited to sedentary work, he was unable to perform past relevant jobs as an insurance sales agent or a manager of food services. [The SSA examiner] also felt that any skills Mr. Giles[ ] may have acquired in his past work would not be transferrable to jobs within his residual functional capacity. Accordingly, Social Security Vocational Rule 201.14 was applicable and directed a finding that he is disabled.
>
> * * *
>
> Social Security Vocational Rule 201.14 provides that when a person is closely approaching advanced age (50–54), is a high school graduate or more but his education does not provide for direct entry into skilled work[, and] he is unable to perform his past relevant work and any skills acquired are not transferrable, a finding that he is "disabled" is directed. (20 CFR, Appendix 2 to subpart P of part 404) ....

***22** Plaintiff's counsel also stated that he enclosed the Vocational Analysis Worksheet to the letter of January 8, 2009. *See* JVG000240. It reflects that Giles's Social Security award was based on Rule 201.14. JVG000206–08. Like the letter from plaintiff's counsel dated January 8, 2009, the Vocational Analysis Worksheet bears date stamps of February 12, 2009; May 14, 2009; February 18, 2010; and May 13, 2010. *See id.;* JVG000239–41. Those "date stamps indicate dates on which each document was reviewed by the Retirement Board." *Giles I*, ECF 49 at 38. Additionally, in his letter to the Plan of January 8, 2009, Giles's counsel stated that he attached a second document, Social Security's Disability Determination and Transmittal form, which, among other things, reflects the Rule 201.14 classification. JVG000240. [15]

Even if those explanations were not sufficiently clear, had the Retirement Board consulted the SSA regulations cited by Giles's counsel, it would have been readily apparent to the Board in early 2009 that Giles's Social Security award was dependent, in part, on his age. SSA regulations state that individuals deemed disabled pursuant to Rule 201.14 are so classified based on their ability to perform only sedentary work, their age of 50 to 54 years, and prior education and skills that are not transferable to skilled, sedentary

employment. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2. On the other hand, an individual limited to sedentary work, with Giles's education and previous work experience, but who is 49 or younger, would be deemed "Not disabled" under Rule 201.21. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1. The Retirement Board recognized as much in its letter of March 27, 2013. JVG000755 (explaining that, prior to reaching age 50, Giles would have been classified by the SSA under Rule 201.21, which does not result in an SSA disability award).

In its denial letter of March 27, 2013, the Retirement Board explained that, in making its latest determination, it "obtained and reviewed the entire Social Security file" in order to "help assess" Giles's Social Security award. JVG000753. The Plan thus suggests that it only became aware of the grounds for Giles's Social Security award upon its review of additional Social Security documents upon remand following *Giles I*. *See* Plan Mem. at 10 ("A thorough review of the newly-obtained SSA file revealed that Mr. Giles qualified as 'disabled' for SSA purposes exclusively under Medical Vocational Rule 201.14."). As evident from the facts recounted above, however, that portrayal ignores the information made known to the Plan as early as January 2009, when plaintiff's counsel advised the Plan of the specific factors—including age—underlying Giles's Social Security award.

In any event, if Giles was ineligible under the Plan for Football Degenerative benefits because his SSA award depended on his reaching the age of 50, the process of evaluating Giles's physical injuries—which required the Retirement Board to scrutinize medical records from multiple physical examinations, dating from as early as 1995—was unnecessary. In other words, the Retirement Board could have determined, based on the information it received in January 2009, that because Giles's disabled status under the SSA's criteria was dependent on his age, he was ineligible for Football Degenerative benefits. Instead, the Retirement Board, operating under the belief that assessing whether Giles's disability "ar[ose] out of League football activities" required it to determine the cause of Giles's physical impairment, undertook the more difficult task of reviewing Giles's medical history in an effort to ascertain whether it was his football career or his obesity that caused his inability to work. *See, e.g.*, JVG000290–91 (Retirement Board letter dated May 18, 2010). It invoked the issue of age only upon determining on remand after *Giles I* that it could no longer dispute that Giles's injuries, limiting him to sedentary work, arose from his NFL career.

b. The "arises out of League football activity" test under the Plan

***23** Turning to the Plan itself, the language and structure of the Plan confirm that whether a "disability" "arises out of League football activity" depends upon the cause of the former player's medical condition. Accordingly, the interpretation that the Plan now offers is unavailing.

To begin, the Retirement Board has essentially endeavored to determine whether individual "vocational factors" used by the SSA "arise[ ] out of League football activities," which is contrary to Plan § 6.4. The exclusion found in Plan § 6.4, on which the Plan relies, *see* Plan Mem. at 1, 5; Plan Reply at 4–5, states that "arising out of League football activities" excludes "a disablement that would not qualify for benefits but for an *injury (or injuries) or illness* that arises out of other than League football activities." Plan § 6.4(c) (emphasis added). Reaching a new Social Security age category simply is not an "injury" or an "illness." Indeed, all of the exclusions recognized under Plan § 6.4(c)—a disablement caused by "other employment"; a disablement caused by "athletic activity for recreational purposes"; or an "injury (or injuries) or illness that arises out of other than League football activities"—address possible alternate causes of a player's medical condition. By contrast, Plan § 6.4(c) provides no justification for extending the "arises out of League football activities" analysis to the "vocational factors" that the SSA uses to determine independently whether a disability award is warranted under SSA standards.

Likewise, other Plan provisions lend no support to reexamining the SSA's "vocational factors" as a means to determine the appropriate level of T & P disability benefits. Simply put, there is no suggestion in Plan § 5.2, § 5.8, or elsewhere, indicating that the Board should analyze the "vocational factors" underlying a valid SSA award as a means to decide whether a disability "arises out of League football activities." Similarly, neither Plan § 5.2 nor Plan § 5.8 contains any suggestion that a player receiving a Social Security disability award, in order to qualify for Football Degenerative benefits, must make some further showing as to how he became eligible under the factors employed by Social Security. The Plan's sole responsibility was to determine whether Giles's medical condition "arises out of League football activities," and the method by which Giles became "totally and permanently disabled" is irrelevant to

that question. *See Giles I,* EC F 49 at 34 ("the method by which the player established his disability is irrelevant to the level of benefit to which he is entitled").

Contrary to the Plan's portrayal, the Social Security determination is of limited use in assessing whether Giles is entitled to Football Degenerative benefits. In evaluating a claimant such as Giles, the SSA need not decide—and did not decide—whether the underlying physical condition—to use the SSA's terms, Giles's "residual functional capacity"—resulted from injuries sustained during his professional football career, or from some other cause. Rather, the SSA's task was to consider the claimant's "symptoms (such as pain), signs, and laboratory findings together with other evidence [it] obtain[s,]" 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(c), to determine "the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs[.]" *Id.* § 200.00(c).

***24** The Retirement Board has not attempted to apply the "arises out of League football activities" test to the SSA's assessment of Giles's medical condition or its classification of his "residual functional capacity." Rather, the Board "concede[d] that Mr. Giles is limited to sedentary employment due to orthopedic impairments that arise out of League football activities." JVG000754. Nor does the Plan argue that Giles's physical condition has declined as a result of aging. To the contrary, it states: "There is no evidence of degenerating impairments over time." Plan Mem. at 17; *see also id.* at 10 (acknowledging that Giles's work limitations, which restricted him to sedentary work, had been "relatively stable over many years"); JVG000755 (letter of March 27, 2013, stating: "The Retirement Board ... has never considered the mere passage of time or aging, *without a worsening or degeneration of the underlying football-caused medical impairments,* to 'arise out of League football activities.' "; "The Board found no evidence in the record that Mr. Giles's football-related impairments worsened or degenerated over time to make him unable to work.") (emphasis added).

Instead, the Plan focuses on one of three "vocational factors" that the SSA uses to determine whether a disability award is appropriate. In particular, the Retirement Board purports to determine whether the factor that "triggered" Giles's status as disabled pursuant to the SSA's regulations—in this instance, Giles's age—"arises out of League football activities." Yet analyzing whether a "vocational factor" such as age "arises out of League football activities" is an illusory exercise: age will never "arise[ ] out of League football activities." [16] In other words, the Plan's conclusion that a "vocational factor" used by the SSA—age—does not "arise[ ] out of League football activities" amounts to forcing a square peg into a round hole. As a practical matter, the Retirement Board's "analysis" of the SSA award serves to foreclose Football Degenerative benefits for players who, like Giles, become Social Security-eligible based in part on their age. In effect, the Board, having accepted, without qualification, the Social Security standard as an alternate basis for T & P disability benefits, has attempted to use the very factors that warrant a SSA disability award as a means to limit the resulting benefits due to Giles.

Moreover, the four principal cases on which the Plan relies, *see* Plan Mem. at 6 n. 20, 17–18, all involve assessments of whether NFL football activities were the cause of a claimant's resulting medical condition. *See Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan,* 410 F.3d 1173, 1179 (9th Cir.2005) (upholding the Board's application of the "but for" standard to deny claim for Football Degenerative benefits where record contained conflicting medical reports regarding the source of former player's neurologic problems); *Courson v. Bert Bell NFL Player Ret. Plan,* 214 F.3d 136 (3d Cir.2000) (former player alleged "that the NFL and its member teams condoned and/or supervised, *inter alia,* his abuse of alcohol for pain relief and, therefore, his alcohol-induced cardio myo pat hy arose from a 'League football activity' within the meaning of the retirement plan"); *Youso v. Bert Bell NFL Player Ret. Plan,* 242 F.3d 379 (Table), 2000 WL 1670886, at *1 (8th Cir. Jan 5, 1999) (per curiam; unpublished) (Retirement Board did not abuse discretion in determining that former player's injuries did not arise from football, where player had suffered lower back injury while falling down a flight of stairs); *Webster v. Bert Bell/Pete Rozelle NFL Player Ret. Plan,* 129 F.3d 607 (Table), 1997 WL 680852, at *1 (5th Cir. Sept.22, 1997) (per curiam; unpublished) (affirming denial of "football" level of benefits where former player's "medical records contain ample evidence that he first became totally disabled as a result of throat cancer, as well as other nonfootball related injuries"), *cert. denied,* 523 U.S. 1022, 118 S.Ct. 1304, 140 L.Ed.2d 469 (1998). The Plan all but acknowledges the distinction between these prior cases and Giles's situation, as it recognizes that those cases involved disabilities that were "caused by non-football related *medical impairments.*" *See* Plan Mem. at 16–17 (emphasis added). Rather than supporting the Plan's current reading of "[a]rising out of League football activities," these cases indicate that Giles's interpretation is the one most consistent with the Plan's prior decisions.

***25** Nor has the Retirement Board shown how its interpretation adheres to the intent of the collective bargaining parties. *See* Giles Reply at 6 (citing JVG000753). In the denial letter of March 27, 2013, the Plan asserted, JVG000753:

> [T]he collective bargaining parties, who have sole authority to define the Plan's benefits, did not intend for a Player who is limited to sedentary work because of League football activities, and who receives an award of Social Security disability benefits due to a later change in status defined solely by rules established by the Social Security Administration, to receive Football Degenerative benefits.

The Plan, however, offers nothing to substantiate that claim. And, in that same paragraph, *see id.*, the Retirement Board stated that "the purpose of the collective bargaining parties [is] to give higher benefits to Players who have become disabled due to degenerative medical conditions that arise out of League football activities"—which, if anything, supports awarding the higher, Football Degenerative benefits to Giles.

Before concluding, I note that this decision does nothing to undermine several important limitations on the receipt of Football Degenerative benefits. First, regardless of whether a player qualifies for T & P disability status under the General Standard or the Social Security Award standard, his medical condition must "arise[ ] out of League football activities" in order to receive Football Degenerative benefits. Accordingly, a player whose work limitation results from some other factor excluded under Plan § 6.4—such as an automobile accident or a chronic disease unrelated to football—will not qualify for benefits at the Football Degenerative level. *See* Plan § 6.4(c) (" 'Arising out of League football activities' does not include ... a disablement that would not qualify for benefits but for an *injury (or injuries) or illness* that arises out of other than League football activities."); *see also, e.g.*, *Youso*, 242 F.3d 379 (Table), 2000 WL 1670886, at *1 (upholding Retirement Board decision that injuries did not arise from football, where player had suffered lower back injury while falling down a flight of stairs); *Webster*, 129 F.3d 607 (Table), 1997 WL 680852, at * 1 (affirming denial of "football" level of benefits where player's "medical records contain ample evidence that he first became totally disabled as a result of throat cancer, as well as other nonfootball related injuries").

Second, the Plan expressly restricts Football Degenerative benefits to those players whose total and permanent disability emerges no more than fifteen years after the player's last credited NFL season. Plan § 5.1(c); *see also* Plan § 5.1(d) (stating that where disability "arises out of League football activities" and results in total and permanent disability 15 or more years after player's last credited NFL season, Inactive benefits are awarded). That restriction has the effect of preventing players from receiving Football Degenerative benefits where the total and permanent disability does not emerge until a specified date falling well after the end of the player's NFL career, which presumably helps to safeguard the Plan from paying that higher level of benefits to players whose injuries follow less directly from their "League football activities." Here, however, neither party disputes that Giles's total and permanent disability arose within fifteen years of his last credited NFL season.

***26** Further, in reaching my conclusion, I am cognizant of the deference owed to the Retirement Board's determination. *See, e.g.*, *Evans*, 514 F.3d at 322. Its discretion, however, is not without limit. The Retirement Board's decision must be reasonable, *see id.*, and it is not entitled to reach a decision inconsistent with the Plan's plain language. *Blackshear*, 509 F.3d at 639.

The Plan's latest rationale for denying Football Degenerative benefits to Giles amounts to a "Hail Mary" pass. In *Giles I*, I concluded that the Plan, having contractually agreed to adopt the Social Security Awards standard for benefits, improperly sought to curtail that provision by adding a requirement—proof of a total inability to work—that was contrary to the Plan's plain language. *See* ECF 49 at 37. The Plan has now conceded that Giles's work limitation resulted from his NFL football activities, and not from an illness, injury, or other cause. Despite that acknowledgment, the Plan has sought to salvage its denial by adding a requirement that Giles's disabled status under the SSA criteria must have "arise[n] out of League football activities." The Retirement Board has denied Football Degenerative benefits because Giles, although physically limited to sedentary work due to injuries sustained during his NFL career, qualified for Social Security disability benefits based in part on his age. Because that limitation is contrary to the Plan, reversal is warranted.

D. Remedy

Although I remanded this case following *Giles I,* "remand is not required, particularly in cases in which evidence shows that the administrator abused its discretion." *Helton v. AT & T Inc.*, 709 F.3d 343 (4th Cir.2013) (citing, *inter alia*, *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir.1993) ("[A] remand for further action is unnecessary here because the evidence clearly shows that [the ERISA plan administrator] abused its discretion."); *Berry v. Ciba–Geigy Corp.*, 761 F.2d 1003, 1008 (4th Cir.1985) ("remand should be used sparingly")). In their cross-motions for summary judgment, neither party sought remand. And, based on the Plan's prior determination, there is no further analysis the Plan must undertake that would justify remand.

III. Conclusion

For the foregoing reasons, summary judgment is granted in favor of plaintiff by the Order that accompanies this Memorandum Opinion.

All Citations

Not Reported in F.Supp.2d, 2013 WL 6909200, 57 Employee Benefits Cas. 2301

Footnotes

1 In particular, I reviewed plaintiff's Motion for Summary Judgment Subsequent to Remand (ECF 63, "Giles Motion") and his supporting memorandum (ECF 63–1, "Giles Mem."); the Plan's Renewed Motion for Summary Judgment (ECF 65) and its supporting memorandum (ECF 65–1, "Plan Mem."); plaintiff's reply (ECF 66, "Giles Reply"); and the Plan's reply (ECF 67, "Plan Reply").

2 When a court directs a remand to a plan fiduciary, the court retains jurisdiction to consider a later challenge by either party to the determination on remand. *See Dickens v. Aetna Life Ins. Co. .*, 677 F.3d 228, 234 (4th Cir.2012). Thus, a remand " 'allow[s] either party to challenge the ensuing eligibility determination by motion before the same court,' " *id.* (quoting *Bowers v. Sheet Metal Workers' Nat'l Pension Fund,* 365 F.3d 535, 537 (6th Cir.2004)), and "preserves for appeal the claims administrator's challenges to the remand order and to 'any final judgment entered by the district court following the ... decision on remand.' " *Dickens,* 677 F.3d at 234 (quoting *Young v. Prudential Ins. Co. of Am.,* 671 F.3d 1213, 1216 (11th Cir.2012)). Accordingly, I granted Giles's request to reopen. ECF 53.

3 I incorporate here by reference the facts set forth in ECF 49. Unless otherwise noted, the facts are undisputed; they are drawn primarily from the Administrative Record. Following remand, the Administrative Record was supplemented to include additional materials, labeled JVG000393–775, submitted under seal. *See* ECF 57, 59, 64. The documents contained in the Administrative Record have been consecutively paginated with Bates numbering using the prefix "JVG." For clarity, I have cited to the record by Bates page number.

4 The Plan is governed by a comprehensive document that is also referred to as the "Plan." *See* JVG000319 *et seq.* The only version of the Plan that is contained in the record is dated April 1, 2009, *i.e.,* after the filing of Giles's first application for T & P disability benefits in 1995 and after the filing in 2008 of the application at issue. Aside from the particular differences that will be discussed, *infra,* the provisions of the Plan relevant to T & P disability benefits apparently have not changed materially since Giles's first application.

5 Because the Retirement Board acts on behalf of the Plan, I have sometimes used the terms interchangeably.

6 A Window Period applicant could also qualify for T & P disability benefits under the General Standard. *See* Plan § 5.8(a), (b)(2). If a Window Period application was successful, the award of T & P disability benefit would be retroactive under certain circumstances, *see* Plan § 5.8(c), and would be reduced by the value of early retirement benefits already received for the same time period. *See* Plan § 5.8(f).

7 The SSA's vocational rules, also known as "Medical–Vocational Guidelines," are set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 2. The Administrative Record also contains a "Vocational Analysis Worksheet" prepared in June 2008 by the SSA examiner who reviewed Giles's application for Social Security disability benefits, which supports the application of Vocational Rule 201.14. *See* JVG000206–08.

8 Suit was initially filed in February 2011 in the United States District Court for the Northern District of Georgia. On April 4, 2011, the Plan moved to transfer the case to this Court. *See* ECF 7. The federal court in Georgia granted the motion on February 27, 2012. *See* ECF 26.

9 The opinion also addressed two preliminary matters, not pertinent here. Specifically, I concluded that the Plan did not suffer from a conflict of interest, ECF 49 at 25–26, and that the Plan did not deny plaintiff the "full and fair review" guaranteed under ERISA. ECF 49 at 26–28.

10 The position of "Medical Director" was established as of April 1, 2008, by Section 11.15 of the Plan, which authorizes the Retirement Board to designate "a board-certified physician as the Plan's Medical Director." Plan § 11.15(a). The Medical Director's duties include the provision of "medical advice with respect to the Plan's neutral physicians and medical examination procedures." Plan § 11.15(b). The Plan states that the "Medical Director will provide advice on medical issues relating to particular disability benefit claims as requested" by members of the Retirement Board. *Id.* However, the Plan prohibits the Medical Director from personally examining players, and states that the Medical Director "will not decide or recommend whether a particular Player qualifies for a disability benefit." *Id.*

Notably, the position of Medical Director is distinct from the position of Medical Advisory Physician. Unlike the Medical Director, the MAP is authorized to determine "whether a claimant medically is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit" under the General Standard for T & P disability, if the Retirement Board is deadlocked as to a particular player's T & P disability benefits claim. Plan § 8.3(a).

11 Similarly, the "vocational factors" of age, education, and work experience determine eligibility for disability benefits where individuals' "residual functional capacity" limits them to "light work" or to "medium work." *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 2 (light work) and Table 3 (medium work); *see also id.* § 201.00(a). As noted, unlike individuals who suffer from more severe disabilities, cases involving claimants such as Giles who retain some limited ability to work "cannot be evaluated on medical considerations alone[.]" *Id.* § 201.00(a).

12 Plan § 5.2 contains one exception, which is not at issue. Under that exception, if four voting members of the Retirement Board determine that the player is receiving Social Security benefits fraudulently, and is not totally and permanently disabled, then he would be ineligible for T & P status. *See* JVG000343 (Plan § 5.2(b)). Here, there is no question that Giles's Social Security disability award is valid.

13 As noted, this definition is located outside the T & P disability benefits provisions in Plan § 5. But, the Board relies on the § 6.4 definition, *see* Plan Mem. at 1, 5; Plan Reply at 4–5, as have other courts in cases involving T & P disability benefits. *See, e.g., Washington v. Bert Bell/Pete Rozelle NFL Ret. Plan, supra,* 504 F.3d at 821 n. 4.

14 The relevant portions of Plan § 5.1(c) and (d) use the term "disability(ies)," whereas Plan § 6.4(c), which defines "[a]rising out of League football activities," uses "disablement." Neither party attaches any significance to these variations, and for simplicity I generally will use the term "disability."

15 Although this document can be found in the supplemental, post-*Giles I* portion of the administrative record, *see* JVG000729, JVG000758, it apparently was not included in the earlier record. The omission is of no consequence, however, because, in addition to receiving the letter from plaintiff's counsel dated January 8, 2009, the Retirement Board apparently reviewed the Vocational Analysis Worksheet (JVG000206–08) multiple times during 2009 and 2010.

16 Although the focus of this case is age, the Retirement Board's reasoning suggests that the SSA's other two "vocational factors"—education and work experience—are also appropriate targets for a "but for" analysis. *See* JVG000753 ("[T]he Retirement Board determined that the key inquiry is to identify the 'but for' cause of a Player's Social Security disability award."). To be sure, under the Plan's proffered reading that relies on the "trigger" concept, those factors typically would not be the final, last-in-time "trigger" that results in eligibility, given that they will likely remain constant over time. Even so, the Retirement Board's logic indicates it would be appropriate to subject those factors to a "but for" analysis. *See* JVG000753 ("[The Retirement Board] would reclassify Mr. Giles to the Football Degenerative category if the trigger for his Social Security award arose out of League football activities, but deny reclassification otherwise."). Just as the process of aging will never result from football, the other "vocational factors" of education and work experience also will not "arise[ ] out of League football activities."

End of Document

SUNNY JANI, as Administrator of the Estate of MICHAEL L. WEBSTER, deceased, Plaintiff, v. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, et al., Defendants.

CIVIL NO.: WDQ-04-1606

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

2005 U.S. Dist. LEXIS 44331

November 7, 2005, Decided

SUBSEQUENT HISTORY: Affirmed by Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 209 Fed. Appx. 305, 2006 U.S. App. LEXIS 30594 (4th Cir. Md., Dec. 13, 2006)

PRIOR HISTORY: Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 2005 U.S. Dist. LEXIS 10150 (D. Md., Apr. 26, 2005)

COUNSEL: [*1] For Sunny Jani, as Administrator of the Estate of MICHAEL L. WEBSTER, deceased, Plaintiff: Cyril Vincent Smith, III, LEAD ATTORNEY, Sean P Vitrano, Zuckerman Spaeder LLP, Baltimore, MD.; Robert Patrick Fitzsimmons, Fitzsimmons Law Offices, Wheeling, WV.

For The Bert Bell/Pete Rozelle NFL Player Retirement Plan, The NFL Player Supplemental Disability Plan, Defendants: John P McAllister, William F Hanrahan, LEAD ATTORNEYS, Douglas W Ell, Groom Law Group Chartered, Washington, DC.

JUDGES: William D. Quarles, Jr., United States District Judge.

OPINION BY: William D. Quarles, Jr.

OPINION

MEMORANDUM OPINION AND ORDER

Sunny Jani, Administrator of the Estate of Michael Webster (the "Plaintiff"), sued the Bert Bell/Pete Rozell NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan (collectively, "the Plan") for wrongful denial of benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (2005). On April 26, 2005, the Court granted Plaintiff's motion for summary judgment, Pending Plaintiff's petition for attorney's fees and costs pursuant to 29 U.S.C. § 1132(g)(1). For the following reasons, [*2] the petition will be granted.

ANALYSIS

ERISA allows the award of "reasonable attorney's fees." 29 U.S.C. § 1132(g)(1).

A. Determining Whether to Award Attorney's Fees

In determining whether to award attorney's fees courts evaluate: 1) the opposing party's culpability or bad faith; 2) its ability to pay; 3) whether awarding attorney's fees would deter others; 4) whether the party requesting attorney's fees sought to benefit all plan participants and beneficiaries or to resolve a significant legal question regarding ERISA; and 5) the relative merits of the parties' positions. *Johannssen v. District No. 1 - Pacific Coast*

District, MEBA Pension Plan, 292 F.3d 159, 178-9 (4th Cir. 2002); *Quesinberry v. Life Insurance Company of North America,* 987 F.2d 1017 (4th Cir. 1993). No one factor is determinative, however, these factors are the "nuclei of concerns that a court should address." *Quesinberry,* 987 F.2d 1017, 1029.

1. Degree of Culpability

Culpability connotes wrongful conduct that is not intentional or deliberate. *Clark v. Metropolitan Life Insurance Company,* 384 F. Supp. 2d 894, 2005 WL 1667785, slip [*3] op. (E.D.Va. 2005); *Edmonds v. Hughes Aircraft Co.,* 1998 WL 782016, slip op. (E.D.Va. 1998). Culpability can be found where a plans decision is "discernibly against the weight of the evidence." *Edmonds,* 1998 WL 782016 at *5; *see also Edmonds v. Hughes Aircraft,* 145 F.3D 1324 (4th Cir. 1998).

Bad faith connotes deliberate misconduct to harm another or advance one's self-interest. *Clark,* 384 F. Supp. 2d 894, 2005 WL 1667785 (bad faith found where the plan denied death benefits contrary to the opinion of its own medical expert and after an incomplete investigation); *Cox v. Reliance Standard Life Insurance,* 179 F.Supp.2d 630 (E.D.Va. 2001)(bad faith found where plan denied death benefits after an inadequate investigation and where the plan sought out, but then rejected the opinion of Commonwealth's attorney that it would be impossible to determine whether beneficiary was committing a felony at the time of his death). Not every abuse of discretion constitutes bad faith. *Wheeler v. Dynamic Engineering, Inc.,* 62 F.3d 634 (4th Cir. 1995).

Webster was diagnosed with brain damage and applied for benefits in 1998, [*4] contending that he had been totally disabled since his retirement from football in 1991. Memorandum Opinion, p. 3,4. Webster provided evidence that he had been unable to work after he retired and evaluations from three doctors (including the plan's doctor) opining that Webster was totally disabled by 1991. *Id* at 4-6. Despite this evidence, the Plan found that Webster was not totally disabled until 1996 and therefore was entitled to smaller benefits. *Id* at 6. The Plan ignored its own doctor, relying instead on Webster's oncologist who did not diagnose cognitive impairments until 1996; there was no indication that the oncologist had previously examined Webster's neurological condition. *Id* at 7-9.

The Court held that the decision to deny benefits was an abuse of discretion. Given the overwhelming evidence supporting Webster's claim, the Plan's decision indicates culpable conduct, if not bad faith. Accordingly, this factor favors the Plaintiff.

2. The Ability of the Parties to Pay the Fees

The Plan does not dispute its ability to pay attorney's fees. Accordingly, this factor favors the Plaintiff.

3. Deterrence

An award of attorney's fees would likely deter the [*5] Plan and other benefit plans from future abuses. Therefore, this factor favors the Plaintiff.

4. Benefit to All Participants of ERISA Plans

There is no evidence that the Plaintiff brought this action for the benefit of all ERISA plan participants or to resolve a significant legal question regarding ERISA itself. Therefore, this factor favors the Plan.

5. The Relative Merits of the Parties Positions

As noted above, the Plan's decision to deny Webster's request for larger benefits was an abuse of discretion that constituted culpable, if not bad faith, conduct. Accordingly, this factor favors the Plaintiff.

As the balance of the five factors favors the Plaintiff, attorney's fees should be awarded.

B. Determining Reasonable Attorney's Fees

In calculating an award of attorney's fees, courts multiply the number of reasonable hours expended by a reasonable rate. *Brodziak v. Runyon,* 145 F.3d 194 (4th Cir. 1998). In deciding what constitutes reasonable hours and rates, courts consider: (1) time and labor expended; (2) the novelty and difficulty of the questions raised; (3) skill required; (4) the attorney's opportunity costs in bringing the litigation; (5) [*6] the customary fee for similar work; (6) the attorney's expectations at the start of the litigation; (7) time limitations imposed; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases. *Id, see also EEOC v. Service News Co.,* 898 F.2d 958, 965 (4th Cir.1990); *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226

n. 28 (4th Cir. 1978).

Plaintiff initially requested $ 170,516.25 in attorney's fees and $ 11,779.36 in costs. The Plan objected to fees charged during the administrative appeal process and Plaintiff reduced his request to $ 125,016.25 in fees and $ 3,746.69 in expenses. On June 7, 2005 Plaintiff submitted a Second Supplemental Affidavit of Cyril Smith detailing additional fees and expenses for work performed after the Court's grant of summary judgment. As the Plan has not responded or objected to this addition, it is incorporated. Accordingly Plaintiff now seeks $ 141,924.75 [*7] in attorney's fees and $ 8,109.25 in expenses. Second Supplemental Affidavit of Cyril V. Smith, Exhibits A,B.

Plaintiff's fee request reflects 425.10 hours of work performed by attorneys Cyril Smith and Sean Vitrano at Zuckerman Spaeder, LLP and Robert Fitzsimmons, a West Virginia plaintiff's lawyer. Mr. Smith, a partner at Zuckerman Spaeder with 19 years experience, charged $ 380.00-$ 400.00 per hour; Mr. Vitrano an associate with 4 years experience, charged $ 250.00-$ 265.00 per hour. Paralegals at Zuckerman Spaeder charged 145.00-160.00 per hour. Mr. Fitzsimmons, who has 27 years experience, charged $ 500.00 per hour.

The Plan argues that fees cannot be recovered for: 1) work performed by Mr. Fitzsimmons; 2) time spent by Mr. Smith on media related activities; 3) fees incurred in Plaintiff's attempt to depose Sarah Gaunt; and 4) expenses incurred.

1. Work Performed by Mr. Fitzsimmons

The Plan argues that Plaintiff cannot recover attorney's fees for the hours charged by Mr. Fitzsimmons because: 1) fees are requested for work performed during the administrative claims process; 2) Mr. Fitzsimmons' work was unnecessary and duplicative; and 3) Mr. Fitzsimmons' fees are excessive.

[*8] a. Work Performed During the Administrative Claims Process

Plaintiff concedes fees cannot be recovered for work performed during the administrative claims process. Accordingly, Plaintiff has amended his request. The $ 141,924.75 in attorney's fees and $ 8,109.25 in expenses Plaintiff requests does not include expenses incurred during the administrative claims process.

b. Work Performed by Mr. Fitzsimmons

The Plan argues that the 18.5 hours of work billed by Mr. Fitzsimmons' work was unnecessary and redundant. Plaintiff contends that Mr. Fitzsimmons provided essential review and guidance of Mr. Smith's work.

As the Plan has noted, Plaintiff may not recover attorney's fees for duplicative work, *Thomas v. Peacock*, 39 F.3d 493 (4th Cir. 1994) *rev'd on other grounds*, *Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996); *Goodwin v. Metts*, 973 F.2d 378 (4th Cir. 1992). Although the majority of Mr. Fitzsimmons billing entries involve the "review" of correspondence, Plaintiff asserts that Mr. Fitzsimmons' participation involved sharing of factual and legal research, development of case strategy and discussions of draft documents. Reply Memorandum, p. [*9] 4. Given Mr. Fitzsimmons knowledge of Mr. Webster and the case, this participation was neither unnecessary nor duplicative. Accordingly, attorney's fees for Mr. Fitzsimmons' work will be awarded.

c. Excessive Fees

The Plan argues that Plaintiff has failed to demonstrate that $ 500.00 per hour is the prevailing rate in the district and, therefore, Mr. Fitzsimmons's rate of $ 500.00 per hour is unreasonable.

According to the evidence provided by Plaintiff, only two law firms (the largest and third largest) in Baltimore charge $ 500.00 per hour for their partners services. Petition for Attorney's Fees, Ex. 6. Only one, the largest firm in the city, charges more than $ 500.00 per hour. *Id.* There is no showing that the two firms that charge $ 500.00 or more per hour do so for ERISA litigation. Although Mr. Fitzsimmons is an experienced attorney, and the Plaintiff prevailed, there is no showing that: 1) the time expended; 2) difficulty of the questions raised; 3) the skill required by the case; 4) opportunity costs incurred; 5) the attorney's expectations at the start of the litigation; or 6) time limitations imposed favor an award of a rate in excess of the local rates.

Accordingly, [*10] the Court will award attorney's fees to Mr. Fitzsimmons at the rate of $ 400.00 per hour, the rate charged by co-counsel Smith. The Plan has not argued that Mr. Smith's rates are unreasonable and $ 400.00 per hour more closely reflects prevailing rates in the District. Therefore, Plaintiff's award of attorney's will

be reduced by $ 1,850.00.

2. Time Spent on Media Related Activities

The Plan argues that the Plaintiff cannot, recover attorney's fees for time Mr. Smith engaged in media-related activities. Plaintiff contends that: 1) Mr. Smith was responding to a media campaign initiated by the Plan; and 2) Mr. Smith's communication with the press constituted case investigation.

Courts determining the reasonableness of fees under § 1988 apply the 12 factor test used in ERISA cases. *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994). Attorney's fees cannot be recovered for media related activities under the Civil Rights Attorney Fee Act, 42 U.S.C. § 1988. *Id.* Accordingly, the Court will adopt the *Rum Creek* prohibition on the recovery of attorney's fees for media related activities. That Plaintiff initiated the media [*11] campaign is irrelevant. Moreover, Home Box Office's (HBO) independently discovered witness helpful to the Plaintiff does not elevate the Plaintiff's communication with HBO to case investigation. Accordingly, Plaintiff will not be awarded attorney's fees for the 6.95 hours Mr. Smith spent on media related activities. Therefore, Plaintiff's award of attorney's fees will be reduced by $ 2,747.00.

3. Fees Incurred in Plaintiff's Attempt to Depose Sarah Gaunt

The Plan argues that Plaintiff should not recover attorney's fees for Plaintiff's unsuccessful attempt to depose Sarah Gaunt because recovery of fees is limited to claims on which Plaintiff prevailed.

When a case includes different claims based on different facts and legal theories, an unsuccessful claim may be treated as if it had been raised in a separate lawsuit. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). When the claim is unsuccessful, no attorney's fees should be awarded. *Id.* However, when the plaintiff's claims involve a common core of facts or related legal theories, the suit cannot be viewed as a series of discrete claims. *Id.*

As Plaintiff's attempted to depose Gaunt to prove that the Plan abused [*12] its discretion in denying Webster benefits, the attempt was directly related to the claim on which Plaintiff prevailed. Accordingly, Plaintiff can recover attorney's fees for work performed in its attempt to depose Gaunt.

4. Recovery of the Expenses of the Litigation

Plaintiff has submitted a request for expenses totaling $ 8,109.25. The Plan contends that Plaintiff is entitled only to costs provided for under 28 U.S.C. § 1920, the general federal cost statute, and therefore Plaintiff is entitled to $ 200 in costs.

Title 29 U.S.C. § 1132(g) vests discretion to award reasonable attorney's fees and costs in the Court. Plaintiff's costs include photocopying expenses, telephone charges, research expenses, overtime for secretaries and the cost of professional services by Maryland First Financial; these expenses are not unreasonable. Accordingly Plaintiff will be awarded costs.

Conclusion

As the Plaintiff was granted summary judgment, and in light of the Plan's conduct, Plaintiff will be awarded attorney's fees and costs. Reasonable fees and costs equal the requested $ 141,924.75 in attorney's fees and $ 8,109.25 in expenses minus [*13] the $ 4597.00 in fees charged in excess of local rates and for media related activities. Accordingly attorney's fees of $ 137,327.75 and expenses of $ 3,847.00 will be awarded.

November 7, 2005

Date

William D. Quarles, Jr.

United States District Judge

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, it is, this 7<th> day of November 2005, ORDERED that:

1. The Defendant Bert Bell/Pete Rozell NFL Player Retirement Plan BE, and hereby IS, ORDERED to pay Plaintiff Suni Jani as Administrator of the Estate of Michael Webster $ 137,327.75 in attorney's fees and $ 3,847.00 in expenses within twelve (12) months of the date of this order; and

2. The Clerk of the Court shall send copies of this

Memorandum Opinion and Order to counsel for the parties.

United States District Judge

William D. Quarles, Jr.

209 Fed.Appx. 305
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,
Fourth Circuit.

Sunny JANI, Administrator of the Estate of Michael L. Webster, deceased, Plaintiff-Appellee,
v.
The Bert BELL/Pete Rozelle NFL Player Retirement Plan; The NFL Player Supplemental Disability Plan, Defendants-Appellants.

No. 05-2386. | Argued: Sept. 18, 2006. | Decided: Dec. 13, 2006.

Synopsis

Background: Professional football player's estate sued retirement plans under the Employee Retirement Income Security Act of 1974 (ERISA), challenging the determination of the disability benefits to which the player was entitled. The United States District Court for the District of Maryland, William D. Quarles, Jr., J., 2005 WL 1115250, entered judgment against the plans, and they appealed.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

[1] evidence did not support a finding by the plans' administrator that the player's permanent mental disability did not begin until after he was no longer actively playing football, and

[2] administrator's finding that the player was not mentally incapacitated in a manner that substantially interfered with the filing of his claim for disability benefits, so as to toll the limitations period, was an abuse of discretion.

Affirmed.

West Headnotes (2)

[1] Insurance
Weight and Sufficiency

Labor and Employment
Weight and Sufficiency

Evidence did not support the determination of an administrator of ERISA plans, finding that a professional football player's permanent mental disability did not begin until after he was no longer actively playing football, such that he was entitled to lesser benefits; the administrator ignored unanimous medical evidence, including that of its own expert, disregarded the conclusion of its own appointed investigator, and relied for its determination on factors disallowed by the plan. Employee Retirement Income Security Act of 1974, § 2, 29 U.S.C.A. § 1001.

3 Cases that cite this headnote

[2] Limitation of Actions
Insanity or Other Incompetency

Finding by an administrator of ERISA plans that a professional football player was not mentally incapacitated in a manner that substantially interfered with the filing of his claim for disability benefits, so as to toll the limitations period, was an abuse of discretion, even though the player's attorney allegedly did not argue expressly for the limitations period to be tolled; for the tolling provision to have any meaning, it had to extend to protect applicants such as the player, who was so mentally disabled that he could not even open his own mail, let alone complete any of the several benefits applications he requested without first securing significant assistance from an attorney. Employee Retirement Income Security Act of 1974, § 2, 29 U.S.C.A. § 1001.

Cases that cite this headnote

***306** Appeal from the United States District Court for the District of Maryland, at Baltimore. William D. Quarles, Jr., District Judge. (CA-04-1606-WDQ).

Attorneys and Law Firms

ARGUED: Edward Arthur Scallet, Groom Law Group, Chartered, Washington, D.C., for Appellants. Cyril Vincent Smith, Zuckerman Spaeder, L.L.P., Baltimore, Maryland, for Appellee. **ON BRIEF:** Douglas W. Ell, Groom Law Group, Chartered, Washington, D.C., for Appellants. Sean P. Vitrano, William K. Meyer, Zuckerman Spaeder, L.L.P., Baltimore, Maryland; Robert P. Fitzsimmons, Wheeling, West Virginia, for Appellee.

Before WILKINSON and DUNCAN, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

Opinion

Affirmed by unpublished opinion. Judge Duncan wrote the opinion, in which Judge Wilkinson and Judge Floyd joined.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge:

****1** Mike Webster, the Hall of Fame center best known for anchoring the offensive line of the Pittsburgh Steelers professional football team from 1974 to 1988, developed brain damage as a result of the multiple head injuries he suffered as a player. He was awarded degenerative disability benefits by the administrator (the "Board") of the NFL's retirement plans.[1] The Board acknowledged that injuries sustained during his football career had caused Webster eventually to suffer total and permanent mental disability in September 1995, four years after his retirement, but denied him the more lucrative benefits reserved for those whose disabilities begin while they are still actively playing football.

Webster's estate sued the retirement plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (2000), claiming that the Board abused its discretion in setting Webster's total disability date at September 1995. The district court ruled that the Board first abused its discretion by ignoring the unanimous medical evidence that established March 1991 as the onset date for Webster's total and permanent disability, and second in refusing to toll the Plan's limitations period for filing a claim for disability. The Plans[2] appealed both rulings.

***307** While recognizing that the decisions of a neutral plan administrator are entitled to great deference, we are nevertheless constrained to find on these facts that the Board lacked substantial evidence to justify its denial here. In particular, the Board ignored the unanimous medical evidence, including that of its own expert, disregarded the conclusion of its own appointed investigator, and relied for its determination on factors disallowed by the Plan. Because we also find that Webster's mental incapacity should have tolled the limitations period, we affirm the decision of the district court.

I.

A.

"Iron Mike" Webster played center in the National Football League ("NFL") for the Pittsburgh Steelers from 1974 to 1988, collecting four Super Bowl rings during that era. J.A. 628-29. After becoming a free agent, Webster started for the Kansas City Chiefs in 1989 and played as a backup center in 1990 before retiring from active play in March 1991. J.A. 629. In total, Webster played 245 games, the most ever by a center, and at one point played six years without missing a single offensive down. J.A. 622-24. Webster was designated an All-Pro nine times during his career and was inducted into the Pro Football Hall of Fame in 1997. *Id.*

Webster endured numerous blows to the head as a center. J.A. 622. The center is the player in the middle of the offensive line and is responsible for snapping the football between his legs to the quarterback to begin each offensive play. Defensive players are permitted to rush at the quarterback as soon as the football is snapped. The center is particularly vulnerable because he must right himself after the snap to protect the quarterback from the oncoming defensive rush. Of particular danger to offensive linemen in Webster's era was the "head slap" technique, in which defensive linemen would begin their quarterback rush by striking the offensive linemen on the sides of the helmet to daze them. J.A. 676. Though made illegal by an NFL rule change in 1977, use of the head slap and other violent techniques by defensive linemen continued. J.A. 683-84.

****2** After playing sixteen years and sustaining multiple concussions, Webster retired from football in March 1991. His remaining eleven years of life were plagued by a series of failed business ventures and stunted career attempts. In fact, the parties agree that none of these attempts at gainful employment succeeded. J.A. 695.

First, Webster was hired to work as a football analyst for NBC in July 1991. J.A. 629. After auditioning in two preseason games, he moved back to Wisconsin and did not continue this work. J.A. 647. Webster also tried his hand as an investor. In May 1992, for example, he invested in "Webster Asset Management, Ltd." and in "Terra Firma Development Trust," which owned real estate in Pittsburgh. J.A. 479, 629.

Webster made a number of representations about his employment status in 1993 and 1994. For example, he told a doctor in May 1993 that he was working "as a financial investment advisor and real estate manager." J.A. 266. He told another doctor during a hospital stay in June 1993 that he was running "several self-owned business [sic] in Pittsburgh," J.A. 277, and that he was part-owner of Olympia Steel, J.A. 294. In August 1993, he applied for a credit card, calling himself the manager of Distinctively Lazer for the previous six months and representing that he earned $80, 000 per year. J.A. 458. In September 1993, Webster told a doctor that he ***308** was employed full-time. J.A. 264. In October 1993, Webster and two others registered the name "Tins, Totes and Tees" for a business to conduct retail sales. J.A. 630.

It is undisputed, however, that none of these business ventures generated income. Tax records, social security records, and Webster's own affidavit show that his only income during 1991-1993 consisted of his final payments from the Chiefs in 1991, deferred payments from the Steelers in 1992, and fees of $10,000 for card-signing and appearances in 1992 and 1993. J.A. 704-49. In fact, an associate of Webster's at Distinctively Lazer told the Board's investigator, "I think there was something mentally wrong with Mike. His business thinking was very poor." J.A. 700-01.

Webster returned to football in 1994 as a strength and conditioning coach for the Chiefs. The Assistant General Manager of the Chiefs indicated that Webster was hired "as a favor" and that he was not "doing very well during this time period and ... may have been living in his car." J.A. 699. Webster later averred that as a strength and conditioning coach he had no "specific coaching duties but was there supposedly to help out if necessary." J.A. 709. In November 1994, Webster showed up at a friend's house, stating that he "was tired of sleeping in his car." J.A. 652. The friend, citing Webster's "strange habits," allowed him to stay for a few months. J.A. 653. Webster left the coaching position at some point in 1995, having earned a total of about $30,000 from the Chiefs for his services. J.A. 409. Webster's former teammates told the Board's investigator that beginning in 1995 through 1997, Webster did not appear well, with some "characterizing his behavior as strange or paranoid." J.A. 518.

****3** Webster was mostly unemployed after 1995, earning essentially nothing until his death in 2002. The Board's investigator summarized Webster's post-retirement history by noting that he found no "evidence that any of [his business ventures] succeeded." J.A. 519. He concluded, "It is unclear whether any of these ventures were successful and whether or not Mr. Webster's health has affected his ability to operate these business ventures." J.A. 464.

Webster had contacted the Board on five occasions in 1995 and 1996, sometimes only days apart, each time seeking an application for filing a disability claim. J.A. 206-210, 215, 218. Not one of these applications was ever completed. Webster was diagnosed in 1998 with brain damage resulting from multiple head injuries he incurred while playing football. In the spring of 1999, Webster finally completed an application for disability benefits under the NFL retirement plans. We now examine the language of those plans.

B.

The Plans provide for four types of benefits for players who suffer a total and permanent ("T & P") disability as a result of football, two of which are relevant here. An applicant may qualify for "Active Football" benefits if "the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability(ies) first arises." J.A. 110 (Plan § 5.1(a)). A lesser benefit, styled "Football Degenerative," is available provided that "the disability(ies) arises out of League football activities, and results in total and permanent disability before the later of (1) age 45, or (2) 12 years after the end of the Player's last Credited Season." J.A. 110 (Plan § 5.1(c)).

***309** Common to both types of benefit, then, is the requirement that an applicant prove that he suffered a T & P disability as a result of playing football. An applicant

"will be deemed to be totally and permanently disabled if the Retirement Board finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." J.A. 111 (Plan § 5.2). However, "[a] Player will not be considered to be able to engage in any occupation or employment for remuneration or profit ... merely because such person is employed by the League *or an Employer ... or is employed out of benevolence*." Plan § 5.2 (J.A. 112) (emphasis added); *see also* J.A. 93 (Plan § 1.13) (defining "Employer" as "a member Club of the League"). The Board may require an applicant "to submit to an examination by a competent physician or physicians selected by the Retirement Board and may be required to submit to such further examinations as, in the opinion of the Retirement Board, are necessary to make an adequate determination respecting his physical or mental condition." J.A. 112 (Plan § 5.2).

****4** To be eligible for the higher Active Football benefits, an applicant must also show that he became disabled while an Active Player, which disability became T & P "shortly after" it first arose. Each of these elements is defined further in the Plan. A player remains an "Active Player" upon retirement until the July 15 following his retirement or the first day of the next preseason training camp, whichever is later. *See* J.A. 91 (Plan § 1.1). An applicant becomes T & P disabled "shortly after" the disability first arises for purposes of the definition of Active Football benefits according to a three-tiered scheme of presumptions:

> A player who becomes totally and permanently disabled no later than six months after a disability(ies) first arises will be conclusively deemed to have become totally and permanently disabled "shortly after" the disability(ies) first arises, ... and a Player who becomes totally and permanently disabled more than 12 months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled "shortly after" the disability(ies) first arises.... In cases falling within this six-to twelve-month period, the Retirement Board will have the right and duty to determine whether the "shortly after" standard is satisfied.

J.A. 111 (Plan § 5.1).

Even if an applicant otherwise would succeed in earning Active Football or Football Degenerative benefits from the onset date of his T & P disability, a limitations provision, added to the Plan and effective for claims received on and after November 1, 1998, may prevent him from recovering certain time-barred benefits. Specifically:

> [N]o total and permanent disability benefit ... will be payable with respect to any month or other period of time that precedes by more than forty-two (42) months the date the Plan Director first receives a written application or similar letter requesting such benefit, provided that such written application or similar letter begins the administrative process that results in the award of the benefit.

J.A. 151 (Plan § 5.7). Section 5.7 also includes a tolling provision, however:

> The forty-two month limitations period in each of the above sentences will be tolled for any period of time during which such Player is found by the Retirement Board to be physically or mentally incapacitated in a manner that substantially ***310** interferes with the filing of such claim.

Id.

C.

Webster applied for Active Football benefits and, in the alternative, Football Degenerative benefits in the spring of 1999. In support of his claim, Webster submitted his post-retirement medical records and the reports of Dr. Fred Krieg, Dr. James Vodvarka, and Dr. Jonathan M. Himmelhoch.

Webster's medical records revealed that he sought medical treatment for certain physical ailments between March 1991 and September 1995. In late 1992, for example,

Webster began to suffer from an "extensive lymphedema," or fluid collection resulting in swelling, "involving both lower extremities." J.A. 273, 276. In May 1993, a CT scan revealed a likely lymphoma, or cancer of the lymph nodes. J.A. 274-75. Webster checked into a hospital in June 1993 under the care of Dr. Stanley Marks, a hematologist and oncologist. A treatment regimen orchestrated by Dr. Marks led to improvement in Webster's physical condition over the subsequent several months. J.A. 264, 269-72.

****5** Webster then saw Dr. Robert Conn, a cardiovascular specialist, for an echocardiogram in January 1994. J.A. 295. Dr. Conn noted in a contemporaneous letter that "Mr. Webster is capable of most *physical* activities that would be relevant to his age and recreational desires." J.A. 295-96 (emphasis added).

Webster followed up with Dr. Marks on September 5, 1996. Dr. Marks noted that Webster's "life has really deteriorated recently and he is living out of his car. His income has been nominal. He has major problems with depression and obsessive compulsive behavior and is currently being treated with Ritalin and Paxil." J.A. 265.

Later that day, Webster met with Dr. Jerry Carter, a psychiatrist, because some of his former teammates had "encouraged him to have an evaluation" after Webster was found sleeping in a local train station. Webster told Dr. Carter that he had been living in hotels and in his car for the previous three-and-one-half years. Webster also insisted that he need only overcome his reclusive tendencies and then his mood and ability to function "would improve considerably." Webster recounted a tumultuous childhood, a history of low self-esteem, and that he was living only for his periodic visits with his children in Wisconsin. J.A. 307.

Webster then saw Dr. Vodvarka, an osteopath and practitioner of internal medicine, in late 1997. J.A. 300-03. Dr. Vodvarka recognized that Webster might be suffering from post-concussion syndrome. J.A. 302.

Webster retained an attorney, Mr. Robert P. Fitzsimmons, to assist him in applying for disability benefits. Fitzsimmons referred Webster to Dr. Krieg, a psychologist, to determine whether Webster was disabled. In November 1998, Dr. Krieg diagnosed Webster with brain damage-that is, dementia resulting from his football-related head traumas. J.A. 227. Dr. Krieg observed that "although it is [to] Mr. Webster's advantage to have 'done poorly' on this evaluation, he really tried throughout the interview to make himself look as good as possible, covering up certain information." J.A. 225. Dr. Krieg concluded that Webster "had become disabled to the extent that he is substantially unable to engage in any occupation or employment at this time." J.A. 232.

Webster was reevaluated by Dr. Vodvarka, who opined in an open letter dated March 1999 that Webster "would have been able to prove total disability at the ***311** time he was released by the Pittsburgh Steelers" because of his dementia and cognitive dysfunction. J.A. 253, 257. Dr. Vodvarka linked Webster's mental ailments to the head injuries suffered during his years of football, and concluded that Webster "will never be able to engage in any occupation or employment for remuneration or profit." J.A. 259.

Webster also met with Dr. Himmelhoch, a psychiatrist, in a series of six sessions beginning in March 1999. J.A. 315. Dr. Himmelhoch opined, in a letter to the Plans dated June 22, 1999, that Webster suffered from "traumatic or punch drunk encephalopathy [3] " resulting from football, leaving him totally and permanently disabled. J.A. 317-20.

****6** Finally, Webster submitted an affidavit stating that he had been unable to perform any productive work for the Chiefs during his coaching tenure in 1994 and 1995 because of the crippling nature of his brain damage. J.A. 709. He explained that "[s]ince completing my football playing years, I have been unable to obtain or keep any type of meaningful and/or gainful employment because of the problems I have experienced from my brain injury." J.A. 710.

Responding to Webster's application, the Board required Webster to be evaluated by a neurologist of its choosing, Dr. Edward Westbrook, on June 21, 1999, pursuant to Plan section 5.2. On a form provided by the Board for his completion, Dr. Westbrook answered the question "When did present disability occur?" with "3/91 or before." J.A. 362. In an accompanying letter dated October 28, 1999, Dr. Westbrook indicated that though Webster offered only a "poor history," he was able to determine that Webster was "completely and totally disabled." J.A. 367.

On the same date that Dr. Westbrook's report issued, the Board awarded Webster Football Degenerative benefits prospectively without setting an onset date for his T & P disability and tabled Webster's application for Active Football benefits "to allow [a] neutral physician to review additional medical information and make [a] final report." J.A. 374.

Webster appealed the decision, which appeal was denied on May 8, 2000 by the Board. J.A. 397-99. First, the Board diminished the significance of its own medical expert's report because the report only indicated when Webster became disabled, not when he became *totally and permanently* disabled. Second, the Board discounted Dr. Vodvarka's assessment that Webster was totally and permanently disabled as of 1988. Because Webster played two more seasons after 1988 with the Chiefs, the Board concluded that Dr. Vodvarka must have misinterpreted the Plan's definition of "T & P disability." Finally, the Board chided Webster for failing to submit sufficient evidence showing that he did not work from 1991 onward. J.A. 399.

Webster appealed again. This time, to respond to the Board's concerns, Webster submitted supplemental reports from Drs. Krieg and Himmelhoch, each of whom concluded, to a reasonable degree of professional certainty, that Webster was totally and permanently disabled as of March 1991. J.A. 580, 608. Webster also submitted a report from Dr. L. Charles Kelly, an osteopath, setting Webster's T & P disability date at March 1991. J.A. 422-25.

To strengthen the appeal, Webster's attorney asked Dr. Westbrook, the Board's ***312** neutral physician, to opine as to the onset date of Webster's T & P disability. Dr. Westbrook wrote to the Board:

> It is clear that the patient had significant trouble playing football in 1990 and officially retired in 1991. It would appear on that basis that he was completely and totally disabled as of the date of his retirement and was certainly disabled when he stopped playing football sometime in 1990.... He has remained completely and totally disabled for any occupation beginning in approximately 1990 and will not be expected to improve.

****7** J.A. 565.

The Board responded on October 31, 2000, by again requesting additional documentation to prove Webster's lack of income during the critical 1991 to 1996 period. Webster submitted records from the Internal Revenue Service, the Social Security Administration, the Commonwealth of Pennsylvania, the Kansas City Chiefs and the Pittsburgh Steelers, corroborating his assertion that he earned nothing after his retirement other than his coaching salary from the Chiefs. J.A. 714-49.

Not satisfied with this response, the Board also hired a private investigator to delve into the details of Webster's employment history. The investigator found evidence that Webster was nominally involved in various business ventures as detailed above, but concluded that he "was unable to find any evidence that any of them succeeded." J.A. 695. While the investigation was underway, Webster died of a heart attack, on September 24, 2002.

The Board finally denied Webster's application for Active Football benefits on March 17, 2003, and set the onset date for his T & P disability at September 1, 1996. In setting this date, the Board gave the following reasons: (1) Webster's work as a broadcaster for two games in 1991, his series of failed business ventures from 1992 to 1994, and his work as an assistant coach for the Chiefs in 1994 and 1995 demonstrated his ability "to engage in any occupation ... for remuneration or profit"; and (2) the medical evaluation in 1996 by Dr. Marks stating that Webster's life "has really deteriorated recently" implies that Webster was not mentally disabled during his 1993 visit to Dr. Marks. J.A. 555. The Board made no reference to either the findings of its own medical expert or the other medical evidence that expressly set the onset date of Webster's T & P disability at March 1991.

Webster's estate appealed the Board's March 2003 decision. In July 2003, the Board affirmed by letter its previous determination, disavowing the medical reports of Dr. Krieg, Dr. Vodvarka, Dr. Himmelhoch, Dr. Kelly, and its own Dr. Westbrook because so much time had passed between 1991 and 1997, when the first of these doctors evaluated Webster for brain damage. J.A. 612-16. Noting that these assessments were not performed "contemporaneous[ly] with the suggested onset date" of Webster's T & P disability, the Board deemed such ex post pronouncements as "speculative and conclusory." J.A. 614-15.

The Board also cited for the first time the 42-month limitation provision in Plan section 5.7 that disallows establishment of an onset date for T & P disability earlier than 42 months prior to the filing of the application, unless the applicant's mental incapacity substantially interfered with the filing of the claim. J.A. 615. Finding that Webster had offered no proof of "substantial interference," the Board found that the limitations provision barred the recovery ***313** of any

benefits prior to January 1, 1996.[4] J.A. 616. This letter of denial marked the Board's final administrative decision.

****8** Webster's estate filed an ERISA complaint in the United States District Court for the District of Maryland, seeking money damages and declaratory relief under § 1132(a)(1)(B) and (a)(3). Both parties moved for summary judgment. The district court granted the Plaintiff's motion, but denied the Plans' motion.

In finding that the Board abused its discretion by denying Webster Active Football benefits, the district court noted that "[e]ach specialist who examined Webster's neurological status concluded that he was totally and permanently disabled under the terms of the Plan by March 1991." *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan,* No. 04-1606, 2005 WL 1115250, at *6 (D.Md. April 26, 2005). The court further found the lack of diagnosis of mental impairment in 1993 by Dr. Marks, an oncologist, to be insufficient to provide "substantial evidence" to justify denial of Active Football benefits to Webster. *Id.* The court also cursorily held that because "Webster had been incapacitated by brain damage since 1991, the Plan's limitations period does not apply to his disability claim." *Id.*

The Plans timely appealed, arguing that the Board's denial of Active Football benefits was a reasoned exercise of discretion supported by substantial evidence and, in the alternative, that the Plan's limitations provision barred recovery of benefits prior to January 1, 1996. We consider each argument in turn.

II.

A.

Because the Plans grant the Board "full and absolute discretion, authority and power to interpret ... the Plan," J.A. 121 (Plan § 8.2), we review the Board's decision under the deferential abuse of discretion standard[5] rather than de novo. *See Smith v. Cont'l Cas. Co.,* 369 F.3d 412, 417 (4th Cir.2004) (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)). The Board's discretion, however, is not unfettered. Its exercise must be supported by substantial evidence. *Bernstein v. CapitalCare,* ***314** *Inc.,* 70 F.3d 783, 788 (4th Cir.1995).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (noting that this definition obtains widely "in varying statutory situations"). It is thus "more than a mere scintilla," *id.,* but "less than the weight of the evidence," *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966).

Because a fiduciary must present substantial evidence to justify a denial of benefits, it logically follows that a fiduciary appears to abuse its discretion when, in denying benefits, it ignores unanimous relevant evidence supporting the award of benefits. *Cf. Pikulas v. DaimlerChrysler,* 397 F.Supp.2d 883, 892-93 (E.D.Mich.2005) (finding an abuse of discretion when a fiduciary denied benefits despite the unanimous evidence of three examining doctors agreeing that the claimant was unable to work); *Giannone v. Metro. Life Ins. Co.,* 311 F.Supp.2d 168, 177-78 (D.Mass.2004) (finding an abuse of discretion when a fiduciary denied benefits, citing the opinion of a non-examining physician, which was contrary to the unanimous opinion of several treating physicians, the fiduciary's own investigator, and the claimant's medical history). Similarly, a plan fiduciary abuses its discretion by crediting a doctor's earlier, incomplete evaluation but ignoring the same doctor's later, more comprehensive opinion. *Donovan v. Eaton Corp., Long Term Disability Plan,* 462 F.3d 321, 329 (4th Cir.2006).

****9** We have required benefits administrators to follow unanimous evidence in other contexts in which we employ an abuse of discretion standard as well. For example, in *Stawls v. Califano,* 596 F.2d 1209 (4th Cir.1979), a case involving a social security disability benefits claim, the administrator denied the applicant's claim for T & P disability benefits because it found that she was unable to prove that her T & P disability began prior to 1962 and was continuously present thereafter. *Id.* at 1213. The administrator ignored the medical opinion of one psychiatrist that the applicant's schizophrenia was indeed continuously disabling, rather than intermittently so, and the medical opinion of another psychiatrist that the disability began prior to 1962. The second psychiatrist, though he had treated the applicant since 1954, had lost his contemporaneous notes. He nevertheless opined in 1976 that the applicant had been disabled prior to 1962. The applicant challenged the denial of benefits in court, and this court ultimately remanded the dispute to the benefits administrator, demanding an explanation for "why the uncontradicted evidence of the psychiatrists should not

suffice to afford recovery." *Id.* Thus, even though the second psychiatrist's ex post and undocumented opinion might have been less weighty were there conflicting medical opinions, it remained uncontradicted and could not therefore be ignored. *See id.; see also Martin v. Sec'y of Dept. of Health, Ed. and Welfare,* 492 F.2d 905, 907-08 (4th Cir.1974) (holding in a social security disability benefits case that the mere "opinion evidence of the non-examining Social Security doctor" is not "substantial enough to sustain [a denial of benefits] when (a) the claimant's subjective evidence of disability, (b) the expert medical opinion of examining physicians, (c) claimant's vocational history, and (d) the objective medical facts, are all to the contrary").

Similarly, our jurisprudence under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2000), allows a claimant to establish total disability by offering uncontradicted reasoned medical evidence. *See,* ***315** *e.g., Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 529 (4th Cir.1998) (citing 20 C.F.R. § 718.204(c)(4) (1997)). It is only "[i]f the evidence is contradicted [that] we must determine whether the ALJ conducted an appropriate analysis of the evidence to support his conclusion." *Hicks,* 138 F.3d at 529; *see also Curry v. Beatrice Pocahontas Coal Co.,* 67 F.3d 517, 521 (4th Cir.1995) (finding that three medical opinions did not constitute "substantial evidence" sufficient to justify a denial of benefits because the doctors had not opined "without equivocation" on the dispositive question-whether the claimant "suffer[ed] *no* respiratory or pulmonary impairment of any kind"). [6]

B.

[1] With the foregoing guidance as to what constitutes substantial evidence in mind, we turn to a consideration of the facts on which the Board here based its decision. We do so mindful of the fact that the Board has the discretion to define "T & P disability" in any reasonable and consistent manner. *See* J.A. 121 (Plan § 8.2(a)); *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan,* 201 F.3d 335, 342 (4th Cir.2000).

****10** The Plans proffer two principal justifications for the Board's denial of Active Football benefits. First, the Plans argue that Webster could not possibly have been "substantially unable to engage in any occupation or employment for remuneration or profit," J.A. 111 (Plan § 5.2), because he was actually employed between 1991 and 1996. The Plans cite Webster's stint as a broadcast analyst for two games in 1991, his work as a strength and conditioning coach for the Chiefs in 1994-95, and his ongoing self-employment from 1991 to 1996.

Not one of these ostensible occupations provides substantial evidence that Webster was not "substantially unable to engage in any ... employment" between 1991 and 1996. First, Webster need only show that he suffered T & P disability "shortly after" his disability first arose upon retirement. Thus, his two-game dalliance ending within six months of retirement does not disprove that he suffered T & P disability "shortly after" retirement. *See* J.A. 111 (Plan § 5.1). In any case, the medical evidence suggests that his stunted broadcasting career was in fact merely an audition that failed as a result of his diminished cognitive capabilities. Second, Webster's coaching position with the Chiefs is excluded from Board consideration by the plain language of the Plan itself. *See* J.A. 112 (Plan § 5.2). Section 5.2 provides, "A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit ... merely because such person is employed by an Employer," that is, by a team, "or is employed out of benevolence." *Id.* Because Webster was "employed by an Employer," and, moreover, was "employed out of benevolence," the Plan twice deprives Webster's brief coaching spell of any conclusive value. Finally, Webster's occasional representations in the early 1990s that he was gainfully employed and that his various sinecures demanded his "full-time" attention evaporate in the absence of any evidence to show that Webster ever earned a single dollar from or contributed anything other than his name to these enterprises. "[U]nable to find any evidence that any of them succeeded," the Board's own investigator ***316** refutes its conclusion that Webster was able to work after retirement. *See* J.A. 695.

Second, the Plans direct us to the evaluations of Webster by various doctors during the critical period that tended to show he was "generally in good health." *See* Appellants' Br. at 46. Not one of these doctors, however, was either asked, or for that matter was qualified, to comment on Webster's *mental* health. That a cardiologist reported, for example, that "Webster is capable of most *physical* activities that would be relevant to his age and recreational desires" proves nothing regarding the state of Webster's brain damage at the time. *See* J.A. 285 (emphasis added). Webster has never argued before the Board, nor does his estate argue now, that he was unable to work because of a *physical* disability.

****11** The Plans lean heavily on the reports of Dr. Marks in particular to prove that Webster was mentally fit in 1993 and 1994, but by September 1996 had suffered a drastic reduction in mental wellness. In examining Webster for pain in his armpit in 1993, Dr. Marks, a hematologist and oncologist, did not record any observations about Webster's mental state. However, in 1996, Dr. Marks reported that Webster's "life has really deteriorated recently." J.A. 265.

The Plans ask us to infer from this change in scope between Dr. Marks's two reports that Webster was not T & P disabled by dint of brain damage in 1993. The Plans assert that had Webster in fact been brain damaged in 1993, "none of the above trained physicians would have missed it." Appellants' Br. at 46. Similarly, the Plans question the lack of any contemporaneous medical evidence between 1991 and 1996 showing that Webster was brain damaged. *Id.*

The Board's own expert, however, opined directly on the question of when Webster's T & P disability began. Dr. Westbrook wrote to the Board, "[Webster] was completely and totally disabled as of the date of his retirement and was certainly disabled when stopped playing football sometime in 1990." J.A. 565. [7]

Thus, the Plans ask us, in short, to do two things: first, to disregard the testimony of the Board's own medical expert (in addition to *all* the others) because it was not "contemporaneous," a fact of which it had to have been aware when it engaged him, and second, to hold that the *absence* of contemporaneous evidence is itself "substantial evidence." As inclined as we are to defer to the Board's discretion, the law does not permit such a leap of faith.

We are not unsympathetic to the Board's desire to protect Plan assets in the context of claims of mental disability that may be susceptible of misdiagnosis. However, the Board is not without recourse in this situation. As we have discussed, the Plan itself provides the Board with tools to resolve precisely this type of scenario-an applicant submitting medical evidence that is substantial but which the Board does not find dispositive. The Board availed itself of one such option by enlisting Dr. Westbrook to examine Webster for mental disability. When Dr. Westbrook returned his reports concurring with Webster's doctors and opining that Webster had become T & P disabled by 1991, the Board was faced with unanimous, albeit ex post, evidence supporting Webster's claim. If the ***317** Board still harbored qualms about the strength of Webster's evidence, it could have easily "required [him] to submit to such further examinations as, in the opinion of the Retirement Board, are necessary to make an adequate determination respecting his ... mental condition." *See* J.A. 112 (Plan § 5.2). Instead, the Board truncated its medical investigation and chose to ignore not only the views of Webster's experts but also that of its own. [8]

In sum, the Board has offered no relevant medical or employment evidence to contradict the unanimous medical opinion of examining experts, even though those opinions were open to challenge. Because these expert opinions at least establish a presumption that Webster is entitled to Active Football benefits, and the Board did not rely on substantial evidence to contradict them, we conclude that the Board abused its discretion in denying Webster Active Football benefits. [9] *Cf. Stawls,* 596 F.2d at 1213 (remanding and demanding an explanation for "why the uncontradicted evidence of the psychiatrists should not suffice to afford recovery").

III.

****12** **[2]** The Plans urge us in the alternative to bar recovery of any benefits that accrued prior to January 1, 1996, pursuant to the Plan limitations provision. Section 5.7 provides that "no total and permanent disability benefit ... will be payable with respect to any month or other period of time that precedes by more than forty-two (42) months" the T & P benefits application date. J.A. 151 (Plan § 5.7).

Webster's estate concedes that Plan section 5.7 applies to his application, but insists that the limitations period should be tolled from March 1991 onward because of Webster's brain damage. The Plan requires that the limitations period "will be tolled for any period of time during which such Player is found by the Retirement Board to be physically or mentally incapacitated in a manner that substantially interferes with the filing of such claim." *Id.* Thus, the issue before the court is whether the Board abused its discretion in finding that Webster was not "mentally incapacitated in a manner that substantially interfere[d] with the filing of [his] claim." *Id.*

The Board is entitled to interpret the terms "mentally incapacitated" and "substantially interferes" in any reasonable manner. *See* J.A. 121 (Plan § 8.2(a)); ***318** *Booth,* 201 F.3d at 342. In its letter denying Active Football benefits to Webster, however, the Board did not define either term nor did it explain why the tolling provision should not

apply to Webster's application. [10] Instead, the Board merely relied on the failure of Webster's attorney to argue expressly for the limitations period to be tolled. *See* J.A. 615.

It would require delicate parsing, however, to decide that the medical and employment evidence that supports a finding of T & P disability on these facts does not also support a finding of mental incapacity that substantially interfered with the filing of Webster's claim. We cannot hold, then, that any further burden of production lay upon Webster to invoke investigation into whether the tolling provision should apply to his case.

That is not to say that "mental incapacity" and "mental T & P disability" are coextensive. To equate the terms would, as the Plans warn, render surplusage the words "or mentally" in the provision tolling the limitations period whenever an applicant is "physically or mentally incapacitated." *See* J.A. 151 (Plan § 5.7).

The Plans argue instead that there is a higher standard for proving "mental incapacity" than for proving "T & P disability." To put it differently, the Plans argue that all mentally incapacitated applicants would suffer from a T & P mental disability, but not all applicants suffering from a T & P mental disability would be deemed mentally incapacitated.

We need not decide whether one standard is higher or the two are merely different. Instead, we need only recognize that in some cases, an applicant suffering from a mental condition that is T & P disabling would be incapacitated to the extent that his condition "substantially interferes" with his filing of a claim. Webster's history presents just such a case.

****13** The Plans point to Webster's numerous requests for disability applications from the Board in 1995 and 1996 as evidence that he was not mentally incapacitated. These requests, however, were at times submitted only days apart. J.A. 206-210, 215, 218. Not one of these applications was ever completed. Contrary to the Plans' assertion, these staccato requests weigh significantly *in favor* of a finding of mental incapacity that "substantially interfered" with Webster's ability to file a claim. For the tolling provision to have any meaning, it must extend to protect applicants such as Webster, who was so disabled that he could not even open his own mail, *see* J.A. 604, let alone complete any of the several benefits applications he requested without first securing significant assistance from an attorney.

***319** Moreover, had Webster been successful in returning any one of these applications, even without any supporting documentation, the limitations provision would never have attached to his case. *See* J.A. 151 (Plan § 5.7) (calculating the 42-months limitations period backwards from the date the Board "first receives a written application or similar letter requesting" the benefit and requiring only that such letter "begin[ ] the administrative process that results in the award of the benefit"). The limitations provision was only added to the Plan effective November 1, 1998, a mere six months prior to the date that Webster finally managed to submit an application for benefits.

The Plans finally insist that it would have been illogical for the Board to have found Webster mentally incapacitated from 1991 to 1998 because he was apparently well enough in 1999 to submit an application. This argument has only superficial appeal. The Plans appear to read the word "substantially" to mean "completely" in the phrase "mentally incapacitated in a manner that substantially interferes with the filing of [a] claim." Such an interpretation cannot be reasonable, however, or the tolling provision would *never* apply to an applicant who is permanently mentally incapacitated. That is, under the Plans' interpretation, the fact that an application is *ever* submitted is evidence that the applicant is not, at that time, suffering from incapacity that "substantially interferes" with the filing of a claim. Instead, we have held that the Board must interpret the tolling provision to give meaning to each word. *See de Nobel*, 885 F.2d at 1188. The Plans' suggested reading of the tolling provision is thus unreasonable.

At bottom, the evidence of Webster's brain damage tends to show not only that he was T & P disabled, but that he was "mentally incapacitated in a manner that substantially interfere[d]" with the filing of his claim. J.A. 151 (Plan § 5.7). The Board has not presented substantial evidence on which to deny Webster the protection of the provision tolling the limitations period. We therefore hold that the Board abused its discretion in applying the limitations provision to bar Webster's claim for Active Football benefits retroactive to March 1991.

IV.

****14** The Plans finally ask us to vacate the award of attorney's fees and costs to Webster's estate. [11] They advance only one argument on appeal supporting the request-that attorney's fees and costs are inappropriate because Jani should

not have prevailed on the merits. Because the Plan failed to make any other argument, the award of attorney's fees and costs should be upheld provided that Webster's estate remains "a prevailing party" on a substantive issue on appeal. *See Martin v. Blue Cross & Blue Shield of Va.*, 115 F.3d 1201, 1210 (4th Cir.1997) ("[O]nly a prevailing party is entitled to consideration for attorneys' fees in an ERISA action."). Webster's estate has prevailed on appeal, and ***320** we therefore uphold the award of attorney's fees and costs.

V.

Because there is nothing in this record on which to uphold the Board's denial of Webster's application for Active Football benefits, the decision of the district court is

AFFIRMED.

All Citations

209 Fed.Appx. 305, 2006 WL 3623047, 40 Employee Benefits Cas. 2049

Footnotes

1 The NFL enrolls all players in the Bert Bell/Pete Rozelle NFL Retirement Plan (the "Plan") and the NFL Player Supplemental Disability Plan (together, the "Plans"). J.A. 98 (Plan art. 2). The operative language determining eligibility for benefits is found in the Plan. The NFL Player Supplemental Disability Plan, in contrast, operates to augment the size of benefits awards after eligibility has been established under the Plan.

2 Because the Plans, not the Board, are the Defendants in this case, we refer to the Board when discussing Webster's application process and to the Plans when discussing party actions during litigation.

3 Encephalopathy literally means "brain disease." Random House Webster's Unabridged Dictionary 640 (2001).

4 The Board's denial letter referred to January 1, *1995* as the retroactivity cutoff date. Presumably, the Board intended to utilize the limitations provision to bar recovery of any benefits prior to January 1, *1996.*

In any case, the parties disagree on which date Webster filed his application for purposes of applying the limitations period. Because we hold that the 42-month rule was tolled here, however, the exact application date is of no moment.

5 The Plans seem to argue for an even higher level of deference than that typically afforded ERISA fiduciaries, because of the knowledge and skill required to assess football injuries in particular. *See, e.g.,* Appellants' Br. at 45 ("The Board believes that the complexity of the Plan here and the unique medical and occupational issues faced by professional football players present special challenges to a decision maker, and that experience with meeting those challenges is important."). To be sure, special knowledge is indeed helpful in making benefits determinations in football, as it is in *any* industry. The deferential abuse of discretion standard obtains in part precisely because courts cannot have expertise in every industry. *See Berry v. Ciba-Geigy,* 761 F.2d 1003, 1006 (4th Cir.1985) ("[T]he standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional."). That our knowledge of football-related disability pales in comparison to the Board's knowledge, however, does not militate to bestowing a higher standard than abuse of discretion. Instead, the Board is entitled to the same abuse of discretion review afforded to knowledgeable fiduciaries of any ERISA plan.

6 We recognize that the standards and processes governing cases involving black lung and social security disability benefits are different from those that apply under ERISA. We refer to this parallel jurisprudence only to show our consistent treatment of unanimous medical evidence in other statutory contexts.

7 The Board discredited Dr. Westbrook's opinion setting an onset date for Webster's TPD, choosing instead to credit only Dr. Westbrook's earlier opinion that did not provide such a date. Parsing a doctor's opinions, however, to ignore his later, more comprehensive assessment is unreasonable. *See Donovan,* 462 F.3d at 329.

8 The Plans claim that the Board customarily invokes its right to utilize a neutral physician only to determine *whether* an applicant is T & P disabled, not *when* he became T & P disabled. This claim is belied by the record. In eight other cases of T & P disability due to brain damage, the Board appointed a neutral physician to examine the applicants. J.A. 757-808. In every such case in which the neutral physician offered a clear, conclusive assessment of the applicant's disability, the Board chose to follow that neutral recommendation. *Id.* In one case in particular, the Board "based the ... effective date [of disability] on the ... report of the Plan neutral psychiatrist." J.A. 786-92. Thus, the Plans cannot now escape the uncontradicted opinion of Dr. Westbrook that Webster became T & P disabled by March 1991.

9 Webster's estate argues further that the Board abused its discretion because its "decisionmaking process was [not] reasoned and principled." *See Booth,* 201 F.3d at 342. Five years and repeated meetings passed between the Board's initial tabling of Webster's claim for Active Football benefits and its final decision to reject Webster's last appeal. Webster's estate insists that the delay arose while the Board was seeking to rationalize its predetermined decision to deny Webster's claim. Appellee's Br. at 49. The Plans, on the other hand, cite this time period as evidence of careful deliberation. Because we find that the Board's decision was not supported by substantial evidence, we need not endorse either of these characterizations.

10 In their reply brief, the Plans for the first time propose a definition for "incapacitated," declaring that a person is incapacitated only "if 'the mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.' " Reply Br. at 21 (quoting *Ortelere v. Teachers' Ret. Bd.,* 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460, 464 (1969)). This dilatory attempt to cabin the breadth of the term "incapacitated" is to no avail. First, the Board's discretion to interpret and define Plan terms does not allow the Plans to contrive ex post interpretations on appeal. Second, the proffered definition renders surplusage the Plan language "in a manner that substantially interferes with the filing of such a claim." That is, if "incapacitated" means "*absolute* incompeten[ce]," then when the Board finds that an applicant is "mentally incapacitated," it would necessarily also find that such incapacity "substantially interfere[d] with the filing of [his] claim." We cannot accept such a definition that would render other Plan language of no moment. *See de Nobel v. Vitro Corp.,* 885 F.2d 1180, 1188 (4th Cir.1989) (warning that a benefits decision cannot be reasonable if it "render[s] some language in the plan documents 'meaningless' ").

11 In ERISA actions, a district court has wide latitude in deciding whether to award attorney's fees and costs. *See* § 1132(g)(1); *Metro. Life Ins. Co. v. Pettit,* 164 F.3d 857, 865 (4th Cir.1998). The district court here found significant that the Board ignored the opinion of its own medical doctor and the "overwhelming evidence supporting Webster's claim, ... relying instead on Webster's oncologist" to make the definitive neurological determination. *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan,* No. 04-1606, at *3-4 (D.Md. November 7, 2005). Because the district court thus found that the Board's "decision indicates culpable conduct, if not bad faith," it awarded attorney's fees to Webster's estate. *Id.* at *4-5.

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261 Fed.Appx. 522
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals, Fourth Circuit.

In re: Wilber Buddyhia MARSHALL, Debtor.
Janet M. Meiburger, Trustee; Wilber Buddyhia Marshall, Plaintiffs-Appellants,
v.
The Bert Bell/Pete Rozelle NFL Player Retirement Plan, Defendant-Appellee.

No. 06-2112. | Argued: Oct. 31, 2007. | Decided: Jan. 14, 2008.

Synopsis

Background: Debtor and bankruptcy trustee sued employee benefit plan pursuant to Employee Retirement Income Security Act (ERISA), challenging plan administrator's determination as to onset date of debtor's total and permanent disability and seeking retroactive benefits for additional eight-month period. The Bankruptcy Court entered judgment in favor of debtor and trustee. Plan appealed. The United States District Court for the Eastern District of Virginia, Gerald Bruce Lee, J., reversed. Debtor and trustee appealed.

Holding: The Court of Appeals held that plan administrator abused its discretion in selecting onset date for debtor's total and permanent disability.

Reversed and remanded.

West Headnotes (1)

[1] Insurance
Weight and sufficiency
Labor and Employment
Weight and sufficiency

ERISA plan administrator abused its discretion in selecting onset date for beneficiary's total and permanent disability based solely on date of examination by doctor who found beneficiary to be totally and permanently disabled, given doctor's opinion that beneficiary's total and permanent disability extended back at least eight months. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B).

2 Cases that cite this headnote

***523** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:06-cv-00075; 02-80496; 04-1020-RGM).

Attorneys and Law Firms

ARGUED: William Daniel Sullivan, Tighe, Patton, Armstrong & Teasdale, P.L.L.C., Washington, D.C., for Appellants. Lonie Anne Hassel, Groom Law Group, Chartered, Washington, D.C., for Appellee. **ON BRIEF:** Janet M. Meiburger, The Meiburger Law Firm, P.C., McLean, Virginia, for Appellant Janet M. Meiburger. Douglas W. Ell, Groom Law Group, Chartered, Washington, D.C., for Appellee.

Before MICHAEL, KING, and DUNCAN, Circuit Judges.

Opinion

Reversed and remanded by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

****1** Wilber B. Marshall, Jr., and his trustee in bankruptcy sued the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan (together, the Plan) under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(1)(B). Marshall and the trustee sought a determination that (1) the Plan's Retirement Board (the Board) erred in determining the onset date of Marshall's total and permanent disability, and that (2) he

was entitled to retroactive benefits for an additional eight-month period. The Board arbitrarily selected the date of a doctor's examination as the onset date. The record, however, contained evidence establishing an earlier onset date, and the bankruptcy court entered judgment in favor of Marshall and the trustee. The district court reversed. Because we conclude that the bankruptcy court's ultimate determination was correct, its judgment will be reinstated.

I.

A.

The Plan provides disability benefits to a vested inactive (or retired) football player who qualifies as "totally and permanently disabled." J.A. 39. According to the terms of the Plan, an applicant for benefits is considered to be totally and permanently disabled if he is "totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." J.A. 41. A benefits recipient may be required to submit to periodic physical examinations for the purpose ***524** of reevaluating his condition; if total and permanent disability ends, benefits are terminated. In the event of termination, a beneficiary may reapply for benefits. The Plan provides that benefits are awarded "retroactive to ... the first of the month following the date of the total and permanent disability," but not more than forty-two months prior to the date the Board receives the application for benefits. J.A. 39.

The Plan is administered by the Board, whose voting membership consists of three representatives of the NFL Management Council and three representatives of the National Football League Players Association (NFLPA). The Plan grants the Board "full and absolute discretion, authority and power" to decide claims for benefits and to interpret the terms of the Plan. J.A. 49-50. If the Board deadlocks on whether a retired player qualifies as totally and permanently disabled, it may by a three-member vote request that the player be examined by a medical advisory physician (MAP), a board-certified orthopedic physician jointly designated by the NFL Management Council and the NFLPA. MAP decisions are final and binding upon the Board.

B.

Marshall played NFL football for twelve seasons, retiring in 1995. As a result of injuries sustained during his playing career, Marshall has degenerative arthritis in both knees, his right elbow, his left shoulder, both ankles, his spine, and his hands. As a vested inactive player under the Plan, he qualifies for disability benefits if he is determined to be totally and permanently disabled.

****2** Marshall first applied for disability benefits in 1997. Based on a finding by neutral physician Dr. Royer Collins on March 6, 1997, that Marshall could do sedentary work, the Board denied the application. Marshall appealed in November of 1997 and was referred to a MAP, Dr. James E. Tibone, who examined Marshall on February 5, 1998, and determined that he was totally and permanently disabled. The Board awarded Marshall benefits retroactive to April 1, 1997. In 1999 Marshall was again examined by Dr. Collins who found that he remained totally and permanently disabled.

In February of 2000 the Board received two unsolicited physicians' reports: one from Dr. Collins, who opined that Marshall was still totally and permanently disabled; and one from Dr. Richard Zipnick, who, in the course of treating Marshall for an unrelated condition, opined that he was capable of doing desk work. The Board consulted Dr. Collins, who then agreed with Dr. Zipnick's conclusion that Marshall could work. The Board next referred Marshall to a MAP, Dr. Bernard Bach, who reported on September 11, 2000, that Marshall did not meet the criteria for total and permanent disability and that he could work in a sedentary position. At its meeting on April 12, 2001, the Board terminated Marshall's benefits effective April 27, 2001. Marshall's June 5, 2001, appeal to the Board was denied on August 2, 2001.

On November 13, 2001, Marshall reapplied for disability benefits. The Board referred him to a neutral physician, Dr. Walter Doren, who examined him on December 7, 2001. Dr. Doren reported on January 3, 2002, that Marshall was unable to work and that based on a review of Marshall's medical records, his symptoms had remained consistent since his initial evaluation in 1997. The Board then referred Marshall to a MAP, Dr. Alfred Tria, who reported on February 21, 2002, that Marshall was totally and permanently disabled. Based on Dr. Tria's report, the Board renewed Marshall's benefits, to commence on March 1, 2002 (the first of ***525** the month after the examination by Dr. Tria). Marshall then sent the Board two letters, the first requesting that the effective date for the benefits be changed to December 2001 and the second requesting that it be changed to February 8, 2002. The Board

changed the effective date to January 1, 2002, the first day of the month after Marshall was examined by Dr. Doren.

In the meantime, on February 5, 2002, Marshall filed a voluntary petition under chapter 11 of the bankruptcy code. In early 2004 Marshall's bankruptcy trustee initiated an adversary proceeding, filing a complaint (later joined by Marshall) against the Plan. The complaint, brought under ERISA, sought benefits (approximately $72,000) that were denied to Marshall for an eight-month period, May 2001 through December 2001. The parties cross-moved for summary judgment based on the administrative record. After a hearing in the summary judgment proceedings, the bankruptcy court (1) noted that the Plan requires benefits to be awarded retroactively to the first of the month following the onset of disability, and (2) that it was an abuse of discretion in this case for the Board to use the date of Dr. Doren's medical examination as the onset date. The bankruptcy court asked the parties for memoranda on whether the question of the actual onset date should be remanded to the Board or whether the court should decide it, either on the administrative record or by taking additional evidence. In its supplemental memorandum the Plan argued against either a remand to the Board or an evidentiary hearing in bankruptcy court and asked the court to decide the case based on the administrative record. After requesting additional briefing on the merits and considering the record, including Dr. Doren's report concluding that Marshall's symptoms had remained consistent since his first disability award, effective April 1997, the bankruptcy court determined that Marshall should receive benefits retroactive to May 1, 2001. The court also assessed attorney fees and costs against the Plan.

****3** The Plan appealed this decision to the district court. The district court reversed, concluding that the Board's decision to award benefits retroactive only to January 1, 2002, was supported by substantial evidence and was reasonable. Marshall now appeals the district court's decision to this court.

II.

A.

We review the decision of a district court sitting in review of a bankruptcy court *de novo*, applying the same standards of review that were applied in the district court; specifically, we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. *Logan v. JKV Real Estate Servs. (In re Bogdan)*, 414 F.3d 507, 510 (4th Cir.2005). In an ERISA case a reviewing court first determines *de novo* whether a benefits plan confers discretionary authority on the administrator or fiduciary. If it does, the court reviews the decision of the administrator or fiduciary for abuse of discretion. *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 232-33 (4th Cir.1997). Under the abuse of discretion standard, a decision is reasonable if it is the result of a deliberate, principled reasoning process and is supported by substantial evidence. *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir.1995). Because the Plan here grants the Board the discretion to decide claims for benefits and to interpret the terms of the Plan, we review the Board's decision for abuse of discretion.

The central question here is whether the Board abused its discretion by using as the ***526** disability onset date the date of Dr. Doren's examination (December 7, 2001) that revealed Marshall was totally and permanently disabled. The Plan provides that benefits must be awarded retroactively to the first of the month after the onset of total and permanent disability. The bankruptcy court concluded that the Plan therefore requires the Board to determine when the onset of total and permanent disability occurred and that the Board abused its discretion by not making a reasonable effort to fulfill its duty in this case.

At oral argument counsel for the Plan stated that the Board does not automatically award benefits on the first of the month after the first doctor's report finding total and permanent disability. For example, when the record contains social security disability records or tax returns reflecting that an applicant is unable to work, the Board has awarded benefits retroactively to the time when employment ended. Counsel asserted, however, that in Marshall's case Dr. Doren's December 2001 examination was the earliest evidence of total and permanent disability in the record after Dr. Bach's September 2000 report that Marshall could work.

We appreciate the difficulty of determining an exact date of total and permanent disability in the case of a degenerative illness, such as Marshall's, where the severity of symptoms may vary from time to time. In some cases the date of a doctor's examination may be the only information available as to the onset date of total and permanent disability, especially when the examining doctor is unable or unwilling to provide an opinion regarding onset. Here, however, the bankruptcy court rejected the Board's arbitrary use of the date of the doctor's examination to reinstate benefits. The bankruptcy

court reviewed the record and found sufficient evidence in Dr. Doren's report to indicate that Marshall's total and permanent disability extended back at least to May 1, 2001. Indeed, Dr. Doren's opinion was that Marshall's symptoms had been consistent since 1997. Thus, in Marshall's case the simple date of Dr. Doren's examination was not the only information available to the Board from which to determine an onset date. In that situation the Board's exclusive reliance on the date of the doctor's examination did not result in an onset determination that was "the result of a deliberate, principled reasoning process." *See Bernstein,* 70 F.3d at 788(internal quotation marks and citation omitted). * As a result, we agree with the bankruptcy court that the Board abused its discretion in selecting the onset date.

**4 For these reasons, we reverse the order of the district court, which had reversed the bankruptcy court, and remand for reinstatement of the judgment of the bankruptcy court.

REVERSED AND REMANDED.

All Citations

261 Fed.Appx. 522, 2008 WL 134200

Footnotes

* We are not unsympathetic to the Plan's argument that allowing benefits to be paid retroactively to May 1, 2001, would create tension with the "final and binding" decision of Dr. Bach on September 11, 2000, that Marshall was not totally and permanently disabled at that time. We simply conclude here that the Board could not escape this tension by ignoring Dr. Doren's finding on January 3, 2002, that Marshall was totally and permanently disabled and that his symptoms had remained consistent since his initial medical evaluation in 1997.

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Only the Westlaw citation is currently available.
United States District Court,
D. Maryland,
Northern Division.

Andrew STEWART, Plaintiff,
v.
BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, et al., Defendants.

Civil No. WDQ–09–2612. | June 19, 2012.

Attorneys and Law Firms

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MEMORANDUM OPINION

WILLIAM D. QUARLES, JR., District Judge.

***1** Andrew Stewart sued the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("the Plan"), the Plan's Retirement Board ("the Board"), and the NFL Player Supplemental Disability Plan ("the Supplemental Disability Plan") for violating the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* On July 19, 2011, the Court granted the Defendants summary judgment on Stewart's breach of fiduciary duty claim, and denied the parties' cross motions for summary judgment on his denial of benefits claim, which proceeded to a bench trial on February 27, 2012. ECF Nos. 37, 54. On March 30, 2012, the parties submitted proposed findings of fact and conclusions of law. ECF Nos. 55, 57. For the following reasons, the Court will find that the Defendants abused their discretion under ERISA, and order them to provide Stewart Football Degenerative T & P benefits.

I. Findings of Fact

As required by Fed.R.Civ.P. 52(a), the Court makes the following findings of fact:

1. The Plan provides retirement, disability, and related benefits to eligible National Football League ("NFL") players and their beneficiaries. Admin. Rec. 387.

2. Under Article 5 of the Plan, a covered player who becomes "totally and permanently" disabled is eligible to receive "a monthly total and permanent disability ("T & P") benefit." Admin. Rec. 404.

3. A player is totally and permanently disabled if "he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." Admin. Rec. 406.

4. The Plan offers four types of T & P benefits:

(a) Active Football. The monthly [T & P] benefit will be no less than $4,000 if the disability(ies) results from [NFL] football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability(ies) first arises.

(b) Active Non-football. The monthly [T & P] benefit will be no less than $4,000 if the disability(ies) does not result from [NFL] football activities, but does arise while the Player is an Active Player and does cause the Player to be totally and permanently disabled 'shortly after' the disability(ies) first arises.

(c) Football Degenerative. The monthly [T & P] benefit will be no less than $4,000 if the disability(ies) arises out of [NFL] football activities, and results in total and permanent disability before fifteen years after the end of the Player's last Credited Season.

(d) Inactive. This category applies if (1) the total and permanent disability arises from other than [NFL] football activities while the Player is a Vested Inactive Player, or (2) the disability(ies) arises out of [NFL] football activities and results in total and permanent disability fifteen or more years after the end of the Player's last Credited Season.

Admin. Rec. 404–05.

5. Under the Plan, a disability "arises out of [NFL] football activities" when it "arises out of any [NFL] pre-season, regular season, or post season game, or any combination thereof, or out of [NFL] football activities supervised by an Employer, including all required or directed. activities." Admin. Rec. 413.

***2** 6. " 'Arising out of [NFL] football activities' does not include ... any disablement resulting from other employment, or athletic activity for recreational purposes, nor does it include a disablement that would not qualify for benefits but for an injury (or injuries) or illness that arises out of other than [NFL] football activities." Admin. Rec. 413.

7. T & P benefits claims are first reviewed by the Plan's Disability Initial Claims Committee ("the Committee").

Admin. Rec. 418–19.

8. The Committee's decision may be appealed to the Board.

Admin. Rec. 417.

9. The Board has six voting members: three who are appointed by the NFL Players Association, and three appointed by the NFL Management Council. Admin. Rec. 416.

10. The Plan gives the Board "full and absolute discretion, authority and power to interpret, control, implement, and manage the Plan." Admin. Rec. 416.

11. The plan provides that the Board and Committee

> will discharge their duties ... solely and exclusively in the interest of the Players and their beneficiaries, and with care, skill, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

Admin. Rec. 419.

12. Stewart is a former NFL player. Admin. Rec. 281.

13. In 1989, Stewart was drafted by the Cleveland Browns.

Admin. Rec. 283.

14. In 1990, he stepped in a hole during summer training camp and "felt a 'pop' in his right Achilles[ ] tendon." Admin. Rec. 283.

15. His right Achilles tendon was partially torn, and Stewart was immobilized and required to wear "a boot." Admin. Rec. 283.

16. In 1991, Stewart joined the Cincinnati Bengals. Admin. Rec. 283.

17. During a Bengals practice, he "took a chop block to his left knee and was taken off the field." Admin. Rec. 283.

18. He was diagnosed with a torn left anterior cruciate ligament ("ACL")[1] and a torn lateral meniscus.[2] Admin. Rec. 283.

19. On August 14, 1991, Dr. Height, the Bengals' team physician, performed surgery on Stewart's left knee. Admin. Rec. 283.

20. After the surgery, Stewart had "extensive rehabilitation," and missed the remainder of the 1991 and 1992 seasons. Admin. Rec. 283.

21. When his contract with the Bengals ended, Stewart was signed by the San Francisco 49ers. Admin. Rec. 283.

22. In 1993, Stewart injured his right hand during a 49ers pre-season game in Barcelona, Spain. Admin. Rec. 283.

23. His hand was x-rayed in Barcelona and injected with a local anesthetic. Admin. Rec. 283–84.

24. About 10 days later, Stewart returned to San Francisco, and was seen by Dr. Gordon Brody. Admin. Rec. 284.

25. His right hand was "very swollen," and Dr. Brody diagnosed Stewart with "a 10 day old complex closed intra-articular fracture." Admin. Rec. 284,

***3** 26. On August 19, 1993, Dr. Brody performed a two-hour surgery to repair the fracture, which was complicated by the delay between the injury and treatment. Admin. Rec. 284.

27. Stewart missed the 1993 season, and joined the Canadian Football League ("CFL") in 1994. Admin. Rec. 284.

28. Stewart played throughout the 1994 and 1995 seasons. Admin. Rec. 284.

29. In December 1996, Stewart had surgery on his right knee and "was recorded to have osteoarthritis[3] in th[at] knee." Admin. Rec. 284.

30. In 1997, while playing for the Toronto Argonauts, Stewart injured his right elbow. Admin. Rec. 284.

31. He was diagnosed with a "partial tear or hematoma in the right triceps [4] with a large olecranon bursitis." [5] *Id.* The bursitis was excised. Admin. Rec. 284.

32. In September 1998, Stewart had a second surgery on his left knee. Admin. Rec. 284.

33. After the surgery, the doctor noted that "the knee was stable," "the patellofemoral joint [6] was normal," "the medial compartment [7] was examined and looked 'fine,' the lateral compartment [8] had a degenerative type tear of the lateral meniscus which was debrided, [9] and the articular surfaces of the femur [10] and tibia [11] were still 'reasonably good.' " Admin. Rec. 284.

34. Stewart retired from football, but rejoined the Argonauts in 2000. Admin. Rec. 284.

35. That year, Stewart tore his distal right quadriceps tendon [12] at training camp; the injury ended his career. Admin. Rec. 284.

36. Stewart remained in Canada and tried to obtain a job in criminal justice, but was unable to pass the required physical exams. Admin. Rec. 284.

37. Stewart found work at a friend's landscape design business, but resigned in 2003 because he was unable to use certain tools, or walk or stand for long periods. Admin. Rec. 284.

38. As of 2009, Stewart remained unemployed. Admin. Rec. 284.

39. On October 27, 2008, Stewart applied to the Plan for T & P benefits. Admin. Rec. 267.

40. In his application, Stewart stated that since 2002 he had been unable to work because of "constant pain due to injuries." Admin. Rec. 268.

41. On November 5, 2008, the Plan informed Stewart that he was "required to be evaluated by a neutral physician." Admin. Rec. 275.

42. Because Stewart refused to leave Canada, the Plan arranged for Dr. Robert Meek, a Canadian orthopedic doctor, to examine him. Admin. Rec. 277, 491.

43. Dr. Meek examined Stewart on January 14, 2009. Admin. Rec. 283.

44. Dr. Meek noted that Stewart's left knee was in "constant pain," he could not squat, he had "difficulty getting out of a chair," and "[s]tairs [were] hard to negotiate." Admin. Rec. 284.

45. Dr. Meek determined that Stewart's left knee "flexe[d] to about 100 degrees," but it "seem[ed] quite painful" to flex further. Admin. Rec. 285.

46. He noted that Stewart had "patellofemoral crepitus [13] and palpable osteophytes [14] on the upper tibia." Admin. Rec. 285.

***4** 47. Stewart had some tenderness, scarring, and numbness "related to the staple from his ACL reconstruction." Admin. Rec. 285.

48. An x-ray showed "a staple and a screw in the femur and the tibia ... from the ACL repair of the left knee." Admin. Rec. 286.

49. After examining Stewart's right arm, Dr. Meek opined that it was "weak at the elbow particularly in extension." Admin. Rec. 285.

50. Stewart could not "do anything vigorous or precise with his right hand because of pain, weakness and inability to fully ... flex his right index finger." Admin. Rec. 285.

51. Stewart had a "palpable defect in the triceps ... and a bulge in the proximal triceps." Admin. Rec. 285.

52. He had "mild osteoarthritis with a loose body of small fragment" at the right elbow, and his "right 2nd metacarpophalangeal joint (MCP) [15] ha[d] a scar over it." Admin. Rec. 285–86.

53. Stewart could "only flex at the MCP to about 85 degrees," and had "particular weakness of the flexor digitorum profundus." [16] Admin. Rec. 285.

54. An x-ray of Stewart's right hand showed "a healed fracture of the distal 2nd [MCP] with 2 small screws in place." Admin. Rec. 286.

55. Dr. Meek opined that "over a football career in the NFL and the CFL," Stewart had suffered "injuries which ... left him with pain and disability in three of his four extremities." [17]

56. Stewart's surgeries had "mitigate[d] or cure[d] these injuries with only partial success." Admin. Rec. 286.

57. Dr. Meek concluded that Stewart was "genuinely disabled"; although Stewart might have "benefit[ted] to some degree from removal of the metal from his right hand and from his left knee area," and might have been "more comfortable ... [were] he [to] ha[ve] a successful total [left] knee replacement," Dr. Meek determined that these surgeries would not make Stewart employable. Admin. Rec. 286.

58. On February 3, 2009, the Committee approved Stewart's T & P benefits claim, but awarded him only "Inactive" T & P benefits because it "found that [Stewart's] disabling condition(s) did not arise out of [NFL] football activities." [18]

59. The Committee provided no explanation of how or why it had reached that conclusion. *See* Admin. Rec. 291–93.

60. On July 15, 2009, Stewart appealed the Committee's determination to the Board, requesting Football Degenerative T & P benefits. *See* Admin. Rec. 312–314.

61. In his appeal, Stewart argued that his left knee and right hand were disabled as "the direct result of his employment with NFL teams," and "there [was] no factual basis for a determination that th[ese] injuries would not be disabling but for the [other] CFL injuries." Admin. Rec. 313.

62. Stewart requested that the Board contact Dr. Meek if it needed clarification of his report, and stated that "implicit in [the] report is [Dr. Meek's] opinion that the NFL related disabilities ... *by themselves* ... prevent [ed] [Stewart's] gainful employment." Admin. Rec. 313–314 (emphasis in original).

***5** 63. Without contacting Dr. Meek, the Board affirmed the Committee's decision on August 18, 2009. *See* Admin. Rec. 317–19.

64. On October 6, 2009, Stewart sued the Defendants for denial of ERISA benefits, and breach of fiduciary duty. ECF No. 1.

65. On April 5, 2010, the parties filed a joint stipulation agreeing to remand Stewart's claim for reconsideration by the Board. ECF No. 12.

66. This Court approved the stipulation on April 8, 2010, and ordered the parties to submit a status report within 30 days after the Board issued its remand decision. ECF No. 13.

67. On April 15, 2010, Paul Scott, a Plan benefits coordinator, asked Dr. Meek to submit a letter clarifying "whether Mr. Stewart would be totally and permanently [disabled] if he had not played in the CFL." Admin. Rec. 475.

68. On April 19, 2010, Scott asked Dr. Bernard R. Bach, an orthopedic surgeon who sometimes acted as a "Medical Advisory Physician" for the Board, [19] to review Stewart's medical records and give his opinion about the claim. Admin. Rec. 480.

69. Dr. Bach submitted his opinion on April 24, 2010. Admin. Rec. 476–78.

70. He stated that he had been "simply asked to review [Stewart's medical records] with regards to whether [his] NFL-related injuries would be consistent with the criteria for total and permanent disability." Admin. Rec. 477.

71. Although he did not "personally review[ ] any radiographs" or "examin [e] the patient," Bach determined that the injuries Stewart sustained in the NFL "would not qualify him for total and permanent disability." Admin. Rec. 477–78.

72. Dr. Bach explained that the NFL-related injuries were to Stewart's "left knee with an ACL injury and partial meniscectomy, a right ankle partial Achilles tendon rupture, and a right hand second metacarpal [20] fracture." Admin. Rec. 476.

73. He stated that after Stewart's second left knee surgery in 1998, a "very brief operative report" stated that "the knee was stable, that the patellofemoral joint was normal, that the medial compartment was examined and looked 'fine,' the lateral compartment had a degenerative type tear of the lateral meniscus which was debrided, and the articular surfaces of the femur and tibia were still 'reasonably good.' " Admin. Rec. 477.

74. He noted that the records indicated that the right Achilles tendon injury was "not a complete injury" and had been "treated nonsurgically," and Stewart had "underwent open treatment of a complex closed articular fracture of the metacarpal head and neck"[21] at Stanford University in 1993. Admin. Rec. 477.

75. Relying on his "experience as a Board Certified ... Orthopaedic Surgeon with a specialty in Sports Medicine," Dr. Bach determined that Stewart's NFL injuries had not left him totally and permanently disabled. Admin. Rec. 478.

76. Dr. Bach also stated that he was a "Medical Advisory Physician[ ] for the [Plan]," but that any opinions rendered as to whether a player qualified for benefits were given "independent of ... whether [the opinions would] qualify a player for [particular] disability benefits." Admin. Rec. 478.

***6** 77. On April 29, 2010, Dr. Meek submitted a letter clarifying his opinion:

Mr. Stewart clearly developed significant injuries while playing in both the CFL and the NFL. His left knee seems to be one of the major sources of disability and it certainly has major post-traumatic arthritis. This is the knee he injured when practicing for the Bengals ... As well, he still has some disability related to the right hand finger injury, which [occurred] when he was with the 49ers. You will recall that this injury was missed at a pre-season game in Barcelona, Spain[,] and not diagnosed and treated for 10 days. It is true that he suffered a significant elbow injury and right knee injury when playing in the CFL as well ... It is always hard to decide which of a series of injuries are the 'disabling' one[s]. On balance, I think his left knee and right hand injuries would have left him disabled, even if he hadn't played in the CFL.

Admin. Rec. 479.

78. In May 2010, Scott requested that Dr. Bach and Dr. Meek review each other's opinions and provide their "complete and final opinion[s] on the matter." Admin. Rec. 481–82.

79. On May 27, 2010, Dr. Bach responded with a one-paragraph letter. Admin. Rec. 483.

80. The first sentence was unclear:

I am in receipt of your theory which in my opinion regarding April 24, 2010 letter and report as well as the response from Dr. Robert N. Meek, M.D., an orthopedic trauma surgeon from Vancouver, British Columbia.

Admin. Rec. 483.

81. Dr. Bach's letter continued:

As you know, the issue in this situation is not whether Mr. Andrew Stewart meets the criteria for line of duty disability; it is whether he is totally and permanently disabled. My understanding of this definition ... is whether an individual is ... unable to perform any line of work. Based on this, in my opinion, Mr. Andrew Stewart is not totally and permanently disabled.

Admin. Rec. 483.

82. On June 7, 2010, Dr. Meek responded:

I appreciate the difficulty you have in determining the permanent disability status of a player who was injured in two different settings, the NFL and CFL. I also appreciate the difficulty Dr. Bach faces in making this determination with only records to review and without the chance to see and examine the patient and his [x-rays]. I feel that talking to and examining the patient and personally reviewing the [x-rays] adds significantly to my ability to assess patients.

Mr. Stewart clearly developed significant injuries while playing in both the CFL and the NFL. His left knee (the one injured and treated when he was with the Bengals) seemed to be one of the major sources of disability and it certainly had major posttraumatic arthritis. The subsequent surgery he

had on his left knee when he was in the CFL was, in my view, clearly related to his original left knee injury sustained in Cincinnati. As well, he had some disability related to the right hand finger injury, which was repaired at Stanford when he was with the 49ers. My final opinion has not changed ... It is always hard to decide which of a series of injuries are the 'disabling' ones. On balance, I think his left knee and right hand injuries would have left him disabled, even if he hadn't played in the CFL.

***7** Admin. Rec. 484 (internal quotation marks omitted).

83. Dr. Meek also stated that Dr. Bach's April 24, 2010 report had "correctly ... reported his potential conflict of interest [because] he is one of the Medical Advisory Physicians for the [Plan]." Admin. Rec. 484.

84. Dr. Meek said that he "ha[d] no likely conflicts of interest and ha[d] not been associated with the NFL or the NFL Players Association." Admin. Rec. 484.

85. On August 2, 2010, Scott sought further clarification from Dr. Bach:

This is an unusual case and the Retirement Board needs your expertise. Please help us by reviewing the following and providing comment and clarification as appropriate:

1. We have been unable to obtain copies of Mr. Stewart's x-rays discussed in Dr. Meek's report. Please address whether your assessment of Mr. Stewart's case would be better substantiated if you could review those x-rays.

2. In your correspondence you state that "the issue in this situation is not whether Mr. Andrew Stewart meets the criteria for line of duty disability; it is whether he is totally and permanently disabled." That is incorrect. We asked you to assume that Mr. Stewart is totally and permanently disabled. The question is, given that assumption, whether Mr. Stewart is totally and permanently disabled due to NFL football activities.

3. We need you to address in detail this issue of whether Mr. Stewart would be totally and permanently disabled based on his NFL football activities only. In your letter of 4/24/2010 you state that Mr. Stewart's NFL-related injuries were

- to his left knee with an ACL injury and partial lateral meniscectomy[,]
- a right ankle partial Achilles tendon rupture, and
- a right hand second metacarpal fracture requiring surgery.

Please explain ... (i) how you believe each of these impairments would likely have evolved had Mr. Stewart NOT played in the CFL (ii) the likely cumulative effect of these NFL-only injuries today, and (iii) whether these NFL injuries by themselves would likely have rendered him totally and permanently disabled.

Admin. Rec. 485.

86. On August 4, 2010, Dr. Bach wrote to Scott that Stewart was "not totally and permanently disabled due to NFL football activities," and review of the x-rays would "not affect [his] opinions." Admin. Rec. 486.

87. Dr. Bach stated that neither "[t]he left knee ACL and partial lateral meniscectomy," nor the "right ankle partial Achilles tendon rupture," would qualify Stewart "for total and permanent disability." Admin. Rec. 486.

88. Dr. Bach concluded that the right hand metacarpal fracture did not disable Stewart, and "[c]umulatively, these three issues would not qualify him for total and permanent disability." Admin. Rec. 486.

89. Dr. Bach also stated:

Clearly Dr. Meek does not understand the collective bargaining process and collective bargaining agreements. Also of interest is the final paragraph [of his opinion] that indicated that I had a potential conflict of interest ... In fact, I have no specific conflict of interest because I am paid independent of the opinions that I render and this is specifically explained to each and every patient that I see as a[M]edical [A]dvisory [P]hysician.

***8** Admin. Rec. 486.

90. On August 18, 2010, the Board reconsidered Stewart's claim, and affirmed its decision that he was ineligible for Football Degenerative T & P benefits. Admin. Rec. 488.

91. At the meeting, the Board noted that the opinions of Dr. Meek and Dr. Bach conflicted. Admin. Rec. 489.

92. The Plan's Medical Director, [22] Dr. Stephen Haas, was at the meeting, and the Board "asked for his views on the matter." Admin. Rec. 490.

93. Dr. Haas "reviewed the conflicting letters and medical reports," and stated that "the matter is 'not even close' "; "Stewart's injuries suffered during his NFL career did not produce total and permanent disability." Admin. Rec. 490.

94. In deciding that Stewart was not entitled to Football Degenerative benefits, the Board "took the following facts into account":

> Dr. Bach is one of the most respected physicians in the Plan's network ... Where appropriate the Board asks him to act as a Medical Advisory Physician ... The Board trusts Dr. Bach's judgment completely; when Dr. Bach acts as a MAP his decisions are 'final and binding' upon the ... Board[.]
>
> Dr. Bach's credentials are impeccable. His 95–page resume is available online. He held a sports medicine fellowship at the Hospital for Special Surgery in New York; he holds an endowed chair in orthopedic surgery at Rush Medical College in Chicago; he has published prolifically and taught continuing education classes frequently. He has won awards from the American Orthopedic Society for Sports Medicine. He maintains an active practice in .orthopedic surgery and sports medicine.
>
> In contrast, Dr. Meek has no history or relationship with the Plan other than in this case ... Dr. Meek has examined no player other than Mr. Stewart on behalf of the Plan.

Admin. Rec. 490–91.

95. The Board also discredited Dr. Meek because "the tone" of his June 7, 2010 letter was "unprofessional" and "cast doubt on the impartiality and reliability of his conclusion"; the Board found that Dr. Meek's statements about Dr. Bach's conflict of interest were "not only wrong but appear[ed] to be intentionally misleading" because "Dr. Bach has absolutely no conflict of interest," "is paid the same regardless of his conclusions," and "[t]ime and time again has concluded that a player is entitled to the benefits he needs." Admin. Rec. 491.

96. The Board noted that, "although Dr. Bach did not personally examine Mr. Stewart, the issue [was] not [Stewart's] current condition ... but rather causation," and "a review of the medical records was sufficient and appropriate." Admin. Rec. 491.

97. The Board characterized Dr. Meek's opinion as based "in large part" on "Mr. Stewart's condition today," which it "found ... difficult to believe [would produce] a reliable opinion" on the issue of causation. Admin. Rec. 491.

98. The Board "relied on the unequivocal views of Dr. Haas" whose credentials were "even more impressive than Dr. Bach's":

> ***9** He has served as an orthopedic consultant to the Social Security Administration, Department of Commerce, Department of Labor, and the White House. [H]e has treated Presidents of the United States. He has decades of experience with orthopedic injuries of professional athletes ..., and he has served as the team physician for several professional sports teams."

Admin. Rec. 491–92.

99. The Board noted that it also relied on "its own extensive experience in reviewing claims for disability benefits." Admin. Rec. 492.

100. The Board concluded that it "could not ignore that Mr. Stewart played in the CFL for at least four years after his NFL career ended," which "strongly suggest[ed] that his NFL injuries could not, by themselves, have caused total and permanent disability ." Admin. Rec. 492.

101. The Board also found that Stewart's "NFL injuries must have been generally amendable to

recovery and rehabilitation, and that a person with major, long-term impairments could not possibly have participated in the incredibly demanding sport of professional football for four or more years after leaving the NFL." Admin. Rec. 492.

102. On September 21, 2010, Stewart submitted a status report informing the Court that the Plan had issued its final denial of his claim, and he wished to proceed with discovery. ECF No. 14.

II. Conclusions of Law

Stewart argued that the Defendants abused their discretion in denying him Football Degenerative T & P benefits because the Board arbitrarily discredited Dr. Meek's opinion, accepted Dr. Bach's "unreasoned and unexplained" report, and impermissibly relied on Dr. Haas's recommendation. ECF No. 56 at 4–16; ECF No. 57 at 15–16. The Defendants countered that the Board's denial was reasonable because there was substantial evidence that Stewart's career in the CFL caused his disabilities, and the Board reasonably relied on the expertise of Drs. Bach and Haas. ECF No. 55 at 15–21.

A. Standard of Review

When, as here, an ERISA benefit plan vests the plan administrator with discretionary authority to make eligibility determinations, the court reviews the administrator's decision for abuse of discretion. *Williams v. Metro. Life Ins., Co.*, 609 F.3d 622, 629–30 (4th Cir.2010). The plaintiff has the burden of proving an abuse of discretion. [23]

Under the abuse of discretion standard, the Court "must not disturb the [administrator's] decision if it is reasonable, even if the court itself would have reached a different conclusion." *Fortier v. Principal Life Ins. Co.*, 666 F.3d 231, 235 (4th Cir.2012). "The administrator's decision is reasonable if it is the result of a deliberate, principled reasoning process and it is supported by substantial evidence[.]" *DuPerry v. Life Ins. Co. of N. Am.*, 632 F.3d 860, 869 (4th Cir.2011) (internal quotation marks omitted). Substantial evidence is that "which a reasoning mind would accept as sufficient to support a particular conclusion." *Id.* It "consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." [24] "[I]f there is evidence to justify a refusal to direct a verdict were the case before the jury, then there is substantial evidence." [25]

***10** The Fourth Circuit has identified eight nonexclusive factors that the Court may consider in reviewing the reasonableness of an administrator's decision:

> (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

DuPerry, 632 F.3d at 869 (internal citation and quotation marks omitted).

In making its determination, the Court may consider only the evidence that was before the plan administrator at the time it made its decision. [26] To be reasonable, the administrator's decision "must be based on the whole record [,] and the [administrator] cannot pick and choose evidence that supports its decision while ignoring other relevant evidence in the record." [27]

B. Stewart's Complaint

The parties agreed that Stewart is totally and permanently disabled; they disputed the cause of his disability and the benefits for which he qualifies.

Stewart asserted that he was entitled to Football Degenerative T & P benefits because his disability arose out of his injuries in the NFL. *See* Compl. ¶ 39. He argued that the Board's decision to deny him those benefits "was not the result of a deliberate, principled reasoning process supported by substantial evidence, but rather was the product of a sham process in which the opinions of Drs. Haas and Bach served as mere backfill for a predetermined outcome." ECF No. 56 at 2 (internal quotation marks omitted).

The Defendants countered that Stewart qualified only for Inactive T & P benefits because "Stewart's lengthy CFL career was a cause of his disabilities." ECF No. 55 at 16. They argued that the Board's decision "was based on substantial evidence, was the product of thorough investigation and consideration, comports with common sense, and was a reasonable resolution in light of the dual-career circumstances here." ECF No. 55 at 2.

The Court applies the eight *DuPerry* factors to determine the reasonableness of the Board's decision.

1. Purposes and Language of the Plan (Factors 1 and 2)

A primary purpose of the Plan is to provide disability benefits to qualifying NFL players and their beneficiaries. *See* Admin. Rec. 387. An ERISA plan administrator is "obligated to guard the assets of the [Plan] from improper claims, as well as to pay legitimate claims." *Brogan v. Holland*, 105 F.3d 158, 164 (4th Cir.1997) (internal quotation marks and ellipsis omitted).

Although the Plan does not explicitly define "degenerative injury," it provides Football Degenerative T & P benefits for injuries that "result[ ] in total and permanent disability before fifteen years after the end of the Player's last Credited Season." *See* Admin. Rec. 404–05. In evaluating Stewart's claim for Football Degenerative T & P benefits, the Board was required to determine whether Stewart's disabilities "ar[ose] out of [NFL] football activities"—such as pre-season practices or regular season games—and "result [ed] in total and permanent disability." *See* Admin. Rec. 404, 413. Stewart's disability did not "aris[e] out of [NFL] football activities" if it "result[ed] from other employment" or "would not [have] qualif[ied][him] for benefits but for an injury ... that ar[ose] out of other than [NFL] football activities." Admin. Rec. 413. Thus, in determining whether Stewart qualified for Football Degenerative T & P benefits, the Board had to determine whether his disability stemmed from NFL injuries that would have left him totally and permanently disabled had he not played in the CFL. *See* Admin. Rec. 404, 413.

***11** The Board was required to make its decision "with [the] care, skill, and diligence ... that a prudent man acting in a like capacity and familiar with such matters" would use. *See* Admin. Rec. 419. The Board was permitted to seek "advice on medical issues" from its Medical Director, Dr. Haas. *See* Admin. Rec. 430. But the Plan did not permit Dr. Haas to "decide or recommend whether [Stewart] qualifie[d] for" Football Degenerative T & P benefits. *See id.*

Stewart argued that the Board violated the Plan's language by soliciting "a benefits eligibility determination from [Dr. Haas] to 'break the tie' " between Drs. Meek and Bach. ECF No. 56 at 1. He pointed to the Board's admission that it had "asked for [Dr. Haas's] views on the matter" and "relied on [his] unequivocal views" in denying Stewart Football Degenerative T & P benefits. *Id* . at 5.

The Defendants countered that Dr. Haas merely advised the Board "on a medical issue, opining that Stewart's injuries suffered during his NFL career did not produce total and permanent disability ." ECF No. 55 at 21.

The administrative record does not establish that Dr. Haas improperly "decide [d] or recommend[ed] whether [Stewart] qualifie[d]" for Football Degenerative T & P benefits. At its August 18, 2010 meeting, the Board noted that the opinions of Drs. Meek and Bach conflicted, and "asked for [Dr. Haas's] views on the matter." *See* Admin. Rec. 489–90. Dr. Haas stated that, in his professional opinion, it was "not even close": "Stewart's injuries ... during his NFL career did not produce total and permanent disability." Admin. Rec. 490.

Whether Stewart's disability stemmed from his NFL injuries determined whether he qualified for Football Degenerative T & P benefits. *See* Admin. Rec. 404, 413. But Dr. Haas did not impermissibly "decide or recommend" which benefits Stewart would receive merely because he opined that Stewart's NFL injuries did not leave him totally and permanently disabled. In making its determination, the Board also considered the opinions of Drs. Meek and Bach, their backgrounds, and Stewart's career. Admin. Rec. 490–92.

Although Stewart argued that Dr. Haas's "cursory statement" was not "advice on medical issues," *see* ECF No. 56 at 5, the Court is not persuaded. The Plan does not define "advice" or specify the detail required of the Medical Director's answers to Board members' questions. [28] Thus, the Court does not agree with Stewart that the Board "plainly violated the Plan by relying on and adopting Dr. Haas's recommendation to deny Stewart's claim for Football Degenerative benefits." ECF No. 56 at 7.

It is less clear whether the Board's ultimate decision comports with the Plan's implied definition of "degenerative injury," or whether the Board acted "with [the] care, skill, and diligence ... that a prudent man acting in a like capacity and familiar with such matters" would use. *See* Admin. Rec. 419.

To answer these questions, the Court must consider the other *DuPerry* factors.

2. Adequacy of the Materials and the Use of Reasoned and Principled Decision–Making (Factors 3 and 5)

***12** Stewart argued that the Board's decision was "not the product of a deliberate, principled reasoning process and was not supported by substantial evidence" because the Board "arbitrarily discredited Dr. Meek" and "relied on flawed and unreasoned reports'from Dr. Bach." ECF No. 56 at 16–17.

The Defendants argued that the Board "conducted a thorough and principled review" and relied on its "own experience," the unequivocal reports of Drs. Bach and Haas, and "common sense." ECF No. 55 at 15–21.

Dr. Meek presented a well-reasoned opinion that Stewart's "left knee and right hand injuries [in the NFL] would have left him disabled, even if he hadn't played in the CFL." *See* Admin. Rec. 479. Dr. Meek reviewed Stewart's medical records, physically examined him, and noted that his left knee was in "constant pain" and he could not "do anything vigorous or precise with his right hand because of pain, weakness and inability to fully ... flex his right index finger." Admin. Rec. 283–85. Dr. Meek concluded that, although Stewart might have "benefit[ted] to some degree" from surgeries on his left knee and right hand, these surgeries would not make Stewart employable. Admin. Rec. 286.

When asked to clarify whether Stewart's NFL injuries left him totally and permanently disabled, Dr. Meek noted that the left knee and right hand had been injured in the NFL. *See* Admin. Rec. 479. Although Stewart had suffered "a significant elbow injury and right knee injury" in the CFL, the records showed no CFL injuries to the left knee and right hand. *See id.* "On balance," Dr. Meek concluded, the "left knee and right hand injuries would have left [Stewart] disabled, even if he hadn't played in the CFL." *Id.*

Despite Dr. Meek's conclusion, the Board acted reasonably in seeking a second opinion. Dr. Meek conceded that "[i]t is always hard to decide which of a series of injuries are the 'disabling' one[s]." *See* Admin. Rec. 479. The Board's failing was in crediting the flawed reports of Dr. Bach over Dr. Meek's opinion.

In his initial report on April 24, 2010, Dr. Bach apparently misunderstood his assignment and addressed whether Stewart was totally and permanently disabled—not whether NFL injuries had caused the disability that Dr. Bach had been asked to presume. [29] Dr. Bach noted that, after a 1998 knee surgery, Stewart's knee was stable, the knee cap was normal, the joint compartments "looked 'fine,' " and "the articular surfaces of the femur and tibia were still 'reasonably good.' " *See* Admin. Rec. 477. He further explained that Stewart had undergone surgery in 1993 for the fracture in his right hand. *See id.* He concluded that the injuries Stewart sustained in the NFL "would not qualify him for total and permanent disability." Admin. Rec. 477–78.

After being asked to review Dr. Meek's report and provide a "complete and final opinion," Dr. Bach remained uncertain about his assignment. He noted in his May 27, 2010 letter that "the issue in this situation is not whether ... Stewart meets the criteria for line of duty disability; it is whether he is totally and permanently disabled." *See* Admin. Rec. 483. Scott told Dr. Bach "[t]hat [was] incorrect"; he was to assume that Stewart was disabled. Admin. Rec. 485. Scott asked Dr. Bach to determine only whether Stewart was totally and permanently disabled because of his NFL injuries, and how the NFL injuries would have evolved had Stewart not played in the CFL. *Id.*

***13** Dr. Bach did not adequately respond to Scott's inquiry. In his August 4, 2010 letter, Dr. Bach merely provided conclusive assertions that neither Stewart's left knee nor his right hand injuries would have left him totally and permanently disabled. *See* Admin. Rec. 486. He did not explain how he reached his conclusion, nor did he respond to Scott's question about how Stewart's NFL injuries would have evolved had he not played in the CFL. *See id.* Dr. Bach also failed to provide any specific criticism of Dr. Meek's conclusion that the NFL injuries alone had caused Stewart's disabilities. *See id.* Dr. Bach stated that "Dr. Meek does not understand the collective bargaining process and collective bargaining agreements" but said nothing about why Dr. Meek's medical opinion was incorrect. *See id.* The absence of any explanation made Dr. Bach's opinion an insufficient basis for denying Stewart Football Degenerative T & P benefits. [30]

Dr. Haas's opinion was inadequate for the same reasons. Although Dr. Haas had "decades of experience with orthopedic injuries of professional athletes" and had reviewed "the conflicting letters and medical reports," *see* Admin. Rec. 490–92, the administrative record is silent as to why Dr. Haas thought the causation issue was "not even close." Because such detail is lacking, the Court cannot conclude that Dr.

Haas's opinion was adequate evidence upon which to base the Board's decision. *See Gorski*, 314 F. App'x at 547.

The Board's past experience and "common sense" were also insufficient bases for the Board's decision. Scott conceded that Stewart's case was "unusual" and the Board needed doctors' expertise to determine whether he qualified for Football Degenerative T & P benefits. *See* Admin. Rec. 485. Indeed, the administrative record refers to no other benefit claimants who played in both the NFL and the CFL, and the Court has found no cases with those facts. Accordingly, the Board's experience reviewing other benefit claims would have been of little or no assistance.

That Stewart was able to continue playing football after his NFL injuries does not establish that those injuries were not disabling.[31] The Plan impliedly defines degenerative injuries as those that result in total and permanent disability "before fifteen years after the end of the Player's last Credited Season." *See* Admin. Rec. 404–05. The Plan thus recognizes that the full effects of a degenerative injury may not be apparent for many years. Moreover, only Active Football and Active Non-football T & P benefits require a showing that the disability arose "shortly after" the injury. *See* Admin. Rec. 404–05. To require the same of claims for Football Degenerative benefits would render meaningless the Plan distinctions among the various types of benefits.

In light of the lack of substantial contradictory evidence, the Court finds that the Board arbitrarily discredited Dr. Meek's opinion that Stewart's NFL injuries left him totally and permanently disabled.[32] Although the Board stated that Dr. Meek lacked the credentials of Drs. Bach and Haas, the Plan clearly thought highly of him: the Plan, not Stewart, arranged for Dr. Meek to examine Stewart and provide a medical opinion about his disability. *See* Admin. Rec. 277, 491. The Board's criticism of Dr. Meek's "unprofessional" tone lacks support. The Board did not explain how his comments about Dr. Bach's potential conflict of interest "cast doubt on the impartiality and reliability of his [medical] conclusion." *See* Admin. Rec. 491. The Board also did not explain why Dr. Bach's tone was not unprofessional, given his statement that Dr. Meek "[c]learly ... [did] not understand the collective bargaining process and ... agreements." *See* Admin. Rec. 486. Nor did the Board discredit Dr. Bach for the unclear opening sentence in his May 27, 2010 letter, which suggested that he had rushed his report.

***14** The Board failed to apply a reasoned and principled decision-making process as required by the Plan. *See* Admin. Rec. 419 (requiring the Board to use the "care, skill, and diligence" of a "prudent man"). Although the Board consulted three doctors, only one—Dr. Meek—provided an adequate basis for deciding whether Stewart qualified for Football Degenerative T & P benefits. Had the Board acted prudently, it would have asked Drs. Bach and Haas to explain how they formed their opinions. *See Gorski*, 314 F. App'x at 547. Instead, the Board simply accepted those opinions without adequate explanation.

In sum, at least three factors weigh against the reasonableness of the Board's decision. The Board failed to use a reasoned and principled process (factor 5) or rely on adequate materials (factor 2). The Board's process also failed to comport with the Plan's language (factor 1) about degenerative injuries and the "care, skill, and diligence ... that a prudent man acting in a like capacity and familiar with such matters" would use. *See* Admin. Rec. 419.

3. Consistency with Earlier Interpretations of the Plan and ERISA's Requirements, Potential Conflicts of Interest, and Relevant External Standards (Factors 4, 6–8)

The remaining factors do not bear on the Court's analysis. The Court cannot determine whether the Board's decision was consistent with past interpretations of the Plan; the administrative record does not refer to other claimants who played in both the NFL and the CFL, and the Court has found no cases addressing that player history. Although Stewart has argued that Bach's report was neither "professional" nor "unbiased," *see* ECF No. 56 at 13, he did not argue at trial that the Board had a conflict of interest.[33] Finally, the parties have not referred to any external standards relevant to the Board's exercise of discretion, and—apart from his assertion that the Board did not follow the Plan's language[34]—Stewart has not alleged that the Board's decision was inconsistent with ERISA's procedural and substantive requirements.[35]

C. The Board's Decision Was An Abuse of Discretion

Considering the relevant factors, the Court concludes that the Defendants abused their discretion in denying Stewart Football Degenerative T & P benefits. Dr. Meek's opinion was the only adequate basis for the Board's decision. A "reasoning mind" would not accept the undetailed reports of Drs. Bach and Haas as "sufficient to support a particular conclusion"

about the cause of Stewart's disability. *See DuPerry,* 632 F.3d at 869. Although the Board was not required to support its decision with a preponderance of the evidence, it needed to produce more than a mere scintilla. *See LeFebre,* 747 F.2d at 208. This it failed to do.

In reaching this conclusion, the Court is aware that the abuse of discretion standard "exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional ."[36] Nonetheless, ERISA demands that plan administrators support their decisions with substantial evidence. *See DuPerry,* 632 F.3d 869; *Brogan,* 105 F.3d at 164. Because the Defendants failed to do so, the Court must overturn their decision to deny Stewart Football Degenerative T & P benefits.

***15** "[I]t is generally the case that when a plan administrator's decision is overturned, a remand for a new determination is appropriate." *Gorski,* 314 F. App'x at 548. This is because the "administration of benefit ... plans should be the function of the designated fiduciaries, not the federal courts." *Id.* Thus, remand is appropriate when the administrator lacked adequate evidence to make a decision,[37] or failed to adequately explain the grounds for the decision.[38] But when "the evidence in the record clearly shows that the claimant is entitled to benefits, an order awarding such benefits is appropriate." *Id.*

Remand is not necessary. The Defendants had adequate evidence to make a decision, *see Sheppard,* 32 F.3d at 125, and they adequately explained the grounds for their decision, *see Flinders,* 491 F.3d 1194. Although Drs. Bach and Haas failed to adequately explain their medical opinions, the Board gave several—unsupported—grounds for its decision. *See* Admin. Rec. 490–92. "[R]emand should be used sparingly,"[39] and the Defendants "had more than adequate opportunities to establish an administrative record containing evidence contradicting [Stewart's] evidence" that his disability arose out of his NFL injuries.[40] That the Defendants failed to do so does not require remand. *See Levinson,* 245 F.3d at 1328.

The only adequate, well-reasoned medical opinion in the record was provided by Dr. Meek, who opined that Stewart's disability arose out of his NFL injuries. Thus, the Court will enter judgment for Stewart and order the Defendants to provide him Football Degenerative T & P Benefits.[41]

III. Conclusion

For the reasons stated above, the Court finds that the Defendants abused their discretion under ERISA and will order the Defendants to provide Stewart Football Degenerative T & P benefits, effective as of August 1, 2008[42]

All Citations

Not Reported in F.Supp.2d, 2012 WL 2374661

Footnotes

1 The ACL "is in the middle of the knee" and "prevents the shin bone from sliding out in front of the thigh bone." *See* MedlinePlus, "Anterior cruciate ligament (ACL) injury," www.nlm.nih.gov/medlineplus/ency/article/001074.htm (last visited June 8, 2012).

2 The meniscus is "a C-shaped piece of cartilage located in the knee" that "serves as a shock-absorption system, assists in lubricating the knee joint, and limits the ability to flex and extend the joint." *See* MedlinePlus, "Meniscus tears," www.nlm.nih.gov/medlineplus/ency/article/001071.htm (last visited June 8, 2012).

3 Osteoarthritis, "the most common form of arthritis," "breaks down the cartilage in your joints." MedlinePlus, "Osteo-arthritis," www.nlm.nih.gov/medlineplus/osteoarthritis.html (last visited June 8, 2012).

4 The triceps is the "large muscle at the back of the upper arm that extends the forearm when contracted." Webster's New World Dictionary 1427 (3d College Ed.1988).

5 Bursitis is inflammation of a bursa, "a filmy-colored sac that protects and cushions [the] joints." MedlinePlus, "Bursitis," www.nlm.nih.gov/medlineplus/bursitis.html (last visited June 8, 2012).

6 The patellofemoral joint is the knee cap. *See* MedlinePlus, "Chondromalacia patella," www.nlm.nih.gov/medlineplus/ency/article/000452.htm (last visited June 8, 2012).

7 "Medial" refers to the inner compartment. *See* Mayo Clinic, "Knee braces for osteoarthritis," www.mayoclinic.com/health/knee-braces/MY00137 (last visited June 8, 2012).

8 "Lateral" refers to the outer compartment. *See* "Knee braces for osteoarthritis," *supra* note 7.

9 Debridement is the surgical "cutting away of dead or contaminated tissue or foreign material from a wound to prevent infection." Webster's New World Dictionary 356 (3d College Ed.1988).

10 The femur is the bone that extends from the hip to the knee. *See* Webster's New World Dictionary 498 (3d College Ed.1988).

11 The tibia, also called the shinbone, is the thicker of two bones between the knee and the ankle. *See* Webster's New World Dictionary 1397 (3d College Ed.1988).

12 The distal right quadriceps is the large, outer muscle at the front of the thigh, which extends the leg. *See* Webster's New World Dictionary 398, 1098 (3d College Ed.1988).

13 Patellofemoral crepitus is a "grating or crackling sound or sensation" of the knee and femur, "as that produced by the fractured ends of a bone moving against each other." *See* Merriam–Webster Medical Dictionary, www.merriam-webster.com/medical/patellofemoral, www.merriam-webster.com/medical/crepitation (last visited June 8, 2012).

14 Osteophytes are "small bony outgrowth[s]." Webster's New World Dictionary 958 (3d College Ed.1988).

15 The MCP is the "large joint[ ] in the hand at the base of each finger," which acts as a "complex hinge joint[ ]" that is "important for both power grip and pinch activities." *See* American Society for Surgery of the Hand, *Arthritis: MP Joint,* www.assh.org/PUBLIC/HANDCONDITIONS/Pages/ArthritisMPJoint.aspx (last visited June 11, 2012).

16 The flexor digitorum profundus is a deep muscle in the side of the forearm that flexes the bones of the four fingers. *See* Merriam–Webster's Medical Dictionary, www.merriam-webster.com/medical/flexor% 20digitorum% 20profundus (last visited June 11, 2012).

17 Admin. Rec. 286. Dr. Meek had also noted that Stewart had "weakness of the right calf" and was unable to "do a toe raise on that side." Admin. Rec. 285. He had "a moderately stiff neck with about half the normal expected motion but ... no neck pain or tenderness." *Id.* "His shoulders both move[d] well and ha[d] no weakness." *Id.* "His left upper extremity [was] normal." *Id.*

18 Admin. Rec. 291–93. The effective date of the benefits was August 1, 2008. Admin. Rec. 291.

19 Under the Plan, Medical Advisory Physicians made determinations on "medical issues submitted by the Retirement Board," and based on their "review [of] all material submitted to the Plan" and additional consultations they deemed necessary. Admin. Rec. 423–24. Under Section 8.3 of the Plan, the Board, if dead-locked, could "submit [its] dispute[ ] to a Medical Advisory Physician for a final and binding determination regarding such medical issues." Admin. Rec. 418. Bach was not acting as a Medical Advisory Physician in the capacity described in Section 8.3 when he was consulted about Stewart's condition. *See* Admin. Rec. 489–90 (letter from Plan Director Sarah E. Gaunt to Michael Rosenthal, noting that the Board had forwarded Stewart's records to Dr. Bach "for his examination and comment," not a "final and binding" decision); *see also* Court's Findings 70 & 76.

20 The metacarpus is the part of the hand between the wrist and the finger bones. *See* Merriam–Webster's Medical Dictionary, www .merriam-webster.com/medical/metacarpus, www.merriam-webster.com/medical/carpus (last visited June 11, 2012).

21 Each metacarpal bone "consists of the base, the shaft, the neck, and the head." Manuel Hernandez & Jacob W. Ufberg, "Boxer's Fracture," eMedicineHealth, www.emedicinehealth.com/boxers_ fracture/article_em.htm (last visited June 11, 2012). "The shaft is the long, slender portion of the bone." *Id.* "The neck is the portion of the bone that connects the shaft to the head." *Id.* "The head of the metacarpal bone connects the metacarpal bone to the bone of the finger." *Id.*

22 The Plan provides for appointment of a Medical Director who will give "medical advice with respect to the Plan's neutral physicians and medical examination procedures." Admin. Rec. 430. The Medical Director "will provide advice on medical issues relating to particular disability benefit claim as requested by a member of the [Board] or a member of the [Committee]." *Id.* "The Medical Director will not examine Players, and will not decide or recommend whether a particular Player qualifies for a disability benefit." *Id.*

23 *Saah v. Contel Corp.,* 780 F.Supp. 311, 315 (D.Md.1991), *aff'd* 978 F.2d 1256 (table), 1991 WL 310225 (4th Cir.1992). *Accord Atwater v. Nortel Networks, Inc.,* 388 F.Supp.2d 610, 617 (M.D.N.C.2005); *Case v. Continental Cas. Co.,* 289 F.Supp.2d 732, 737 (E.D.Va.2003).

24 *LeFebre v. Nestinghouse Elec. Corp.,* 197, F.2d 197, 208 (4th Cir.1984), *overruled by implication on other grounds by Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003).

25 *Bickel v. Sunbelt Rentals, Inc.,* Case No. WMN–09–2735, 2010 WL 3938348, at *3 (D.Md. Oct.6, 2010) (internal quotation marks omitted) (*quoting Laws v. Celebrezze,* 368 F.2d 640, 642 (4th Cir.1966)).

26 *See, e.g., Stup v. UNUM Life Ins. Co. of Am.,* 390 F.3d 301, 307 n. 3 (4th Cir.2004), *abrogated on other grounds, Metro. Life Ins. Co. v. Glenn,* 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008). *See also Williams v. Metro. Life Ins. Co.,*

609 F.3d 622, 631 (4th Cir.2010) (a court may consider only "the existing administrative record," not "any testimony or other additional evidence obtained outside the administrative record").

27 *Mills v. Union Sec. Ins. Co.,* —— F.Supp.2d ——, 211 WL 2036698, at *11 (E.D.N.C. May 24, 2011) (*citing Myers v. Hercules, Inc.,* 253 F.3d 761, 768 (4th Cir.2001)).

28 Common definitions of "advice" include an "opinion given as to what to do or how to handle a situation," "counsel," and "information." *See* Webster's New World Dictionary 20 (3d College Ed.1988).

29 *See* Admin. Rec. 477 (Dr. Bach noting that he had been "simply asked to review [Stewart's medical records] with regards to whether [his] NFL-related injuries would be consistent with the criteria for total and permanent disability").

30 *See Gorski v. ITT Long Term Disability Plan for Salaried Employees,* 314 F. App'x 540, 547 (4th Cir.2008) (because a doctor had "never explained on what basis he doubted" the plaintiff's disability, his report was "an unreasoned and unexplained rejection of the objective evidence in the record"); *Cf. Lucy v. Macsteel Serv. Ctr. Short Term Disability Plan,* 107 F. App'x 318, 321 (4th Cir.2004) ("no reasonable factfinder could conclude that [the plaintiff] was disabled based on the conclusory statements of two physicians").

That Dr. Bach never physically examined Stewart does not establish the inadequacy of Dr. Bach's opinion. *See* ECF No. 56 at 10–11. The issue before the Board was whether Stewart's NFL injuries would have left him disabled had he never played in the CFL, not whether he was disabled. *See* Admin. Rec. 404, 413. Because the Court is not a medical expert, it cannot conclude that such a causation opinion requires a physical examination.

31 *See* Admin. Rec. 492 (noting that the Board "could not ignore that Mr. Stewart played in the CFL for at least four years after his NFL career ended," which "strongly suggest[ed] that his NFL injuries could not, by themselves, have caused total and permanent disability").

32 *See Nord,* 538 U.S. at 834 ("Plan administrators ... may not arbitrarily refuse to credit a claimant's reliable evidence[.]").

33 On January 13, 2011, Magistrate Judge Beth P. Gesner denied Stewart's discovery request for depositions to "determine the extent of any conflict of interest." *See* ECF No. 27 at 2, 5. Judge Gesner was persuaded by an opinion of the Court that had found that the Board had no conflict of interest, and reasoned alternatively that Stewart would have to rely on the administrative record to prove a conflict. *Id.* at 2–4.

34 *See supra* Part II.B.I.

35 *See, e.g., Friz v. J & H Marsh & McLennan, Inc.,* 2 F. App'x 277, 282 (4th Cir.2001) ("decision was consistent with the procedural and substantive requirements of ERISA" when it was "consistent with the language of the Plan" and the plaintiff "was fully aware of his rights and obligations under the Plan"); *Rust v. Elec. Workers Local No. 26 Pension Trust Fund,* Case No. 10–0029, 2011 WL 4565501, at *13 (W.D.Va.2011) (decision to terminate and rescind benefits was not "consistent with the procedural and substantive requirements of ERISA" when the Defendants had, *inter alia,* failed "to include certain information in the termination ... and the appeal denial letters (such as information regarding Plaintiff's rights under ERISA to file suit or to request Plan documents)").

36 *Berry v. Ciba–Geigy,* 761 F.2d 1003, 1006 (4th Cir.1985), *cited in Jani v. Bell,* 209 F. App'x 305, 313 n. 5 (4th Cir.2006).

37 *See Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.,* 32 F.3d 120, 125 (4th Cir.1994).

38 *See Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.,* 491 F.3d 1180, 1194 (10th Cir.2007) (*cited in Gorski,* 314 F. App'x at 548).

39 *See Elliott v. Sara Lee Corp.,* 190 F.3d 601, 609 (4th Cir.1999) (internal quotation marks omitted).

40 *See Levinson v. Reliance Standard Life Ins. Co.,* 245 F.3d 1321, 1328 (11th Cir.2001) (affirming district court's decision that remand was not necessary "because the administrator had considered all of the record evidence and had reached a conclusion ... that was unsupported by the evidence in the record").

41 *See Gorski,* 314 F. App'x at 549 (remand for a new benefits determination was not necessary because "the only reasonable decision available to [the plan administrator] was to reverse its earlier decision discontinuing [the plaintiff's] benefits"; two doctors had opined that the plaintiff was disabled, and a third doctor's opinion to the contrary was so "incomplete" that "there simply was no basis by which [the plan administrator] could have discredited [the other two doctors'] medical opinions").

42 *See supra* note 18.

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